

C O N F I D E N T I A L

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1 STATE OF MINNESOTA DISTRICT COURT

2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

3 Case Type: Other Civil

4 The State of Minnesota,
by Hubert H. Humphrey, III,
5 its Attorney General,
and
6 Blue Cross and Blue Shield
of Minnesota,

7

Plaintiffs,

8 vs. File No. C1-94-8565

9 Philip Morris Incorporated,
R.J. Reynolds Tobacco Company,
10 Brown & Williamson Tobacco Corporation,
B.A.T. Industries P.L.C., Lorillard
11 Tobacco Company, The American Tobacco
Company, Liggett Group, Inc., The Council
12 for Tobacco Research-U.S.A., Inc., and
The Tobacco Institute, Inc.,

13

Defendants.

14 - - - - -

15 DEPOSITION OF DR. HYMAN BERMAN

16 Volume I, Pages 1 - 377

17

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19 (The following is the deposition of
20 DR. HYMAN BERMAN, taken pursuant to Notice of Taking
21 Deposition, at the offices of Dorsey & Whitney,
22 Pillsbury Center South, 220 South Sixth Street,
23 Minneapolis, Minnesota, commencing at 8:29 a.m.,
24 September 15, 1997.

25

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C O N F I D E N T I A L

3

1 INDEX

2	THE WITNESS	EXAMINED BY	PAGE
3	Dr. Berman	Mr. Manning	4
4			

5

6

7

8

8 EXHIBIT INDEX

10 3135 22 Berman Expert Report
11 3136 308 Amended Complaint
12 3137 337 5/4/81 Letter
13 Cowan to Long
14 3138 347 10/6/82 Memo
Burrows to Hall

15

16

17

18

19

20

21

22

23

24

25

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1 P R O C E E D I N G S

2 (Witness sworn.)

3 DR. HYMAN BERMAN,

4 called as a witness, being first duly sworn,

5 was examined and testified as follows:

6 ***

7 EXAMINATION

8 BY MR. MANNING:

9 Q. Mr. Berman, how do you like to be addressed?

10 Professor Berman? Mr. Berman? What's your
11 preference?

12 A. It's immaterial.

13 Q. Okay.

14 Have you ever had your deposition taken before?

15 A. Yes, I have.

16 Q. How many times?

17 A. I believe once.

18 Q. When?

19 A. Oh, may have been about four, five years ago.

20 Q. What type of matter?

21 A. It was in a case having to do with a -- workers
22 suing the -- the United Food and Chemical --
23 Commercial Workers Union for not carrying through
24 contract negotiations that would allow them to be
25 promoted.

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1 Q. Did you testify as an expert?

2 A. Yes.

3 Q. In what capacity?

4 A. Capacity as a labor historian.

5 Q. As a labor historian?

6 A. As a labor historian.

7 Q. You did not testify in that case as an awareness
8 expert?

9 A. No.

10 Q. And is that the only other time that you've
11 testified as an expert, to your knowledge?

12 A. Maybe three, four times.

13 Q. You have testified?

14 A. Testified -- oh, testified twice. Actually in a
15 court of law.

16 Q. Okay. Let me back up, then.

17 There have been times you've testified in a
18 court of law where you have not given a deposition?

19 A. Where I have not given deposition?

20 Q. As I understand what you told me is you've given
21 one deposition.

22 A. I've given one deposition which did not lead to
23 my testifying, yes.

24 Q. Okay.

25 A. The -- I testified in two matters in which I did

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1 not give depositions.

2 Q. What were those?

3 A. One had to do with the question of whether, in
4 fact, the Minnesota State Constitution prohibited --
5 in its lottery prohibition provision prohibited the
6 Canterbury- -- then called Canterbury Downs from
7 having on-track betting.

8 Q. Who did you testify -- on whose behalf?

9 A. Canterbury Downs.

10 Q. In what capacity did you testify?

11 A. As a Minnesota historian.

12 Q. And as a legislative historian?

13 A. Minnesota historian in general, with knowledge
14 of the Minnesota Constitution.

15 Q. Okay. What year was that?

16 A. That's -- to the best of my recollection, that
17 was about four years ago. Five years ago.

18 Q. Who were the lawyers in that case?

19 A. It was the Popham firm.

20 Q. That's who you worked with?

21 A. Yes.

22 Q. Who did you work with in the labor case, the
23 United Foods --

24 A. The labor case I don't recall. It was a
25 St. Paul firm, but I don't recall the particular

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1 firm.

2 Q. Okay. Now there was another time that you gave
3 testimony, --

4 A. Yes.

5 Q. -- that you didn't give a deposition?

6 A. That is correct. That was in a case having to
7 do with the -- the right of the State of Minnesota to
8 pass legislation prohibiting the use of -- the --
9 prohibiting permanent replacement workers in times of
10 strikes.

11 Q. And who did you testify for?

12 A. Testified for the state of Minnesota. Well,
13 actually testified for -- in that case for the
14 Teamsters Joint Council, but...

15 Q. For the Teamsters Joint Council?

16 A. Yes.

17 Q. Okay. What law firm?

18 A. The law firm of Steve Gordon.

19 Q. Okay. When was that testimony?

20 A. That was, oh, about three or four years ago, I'd
21 say.

22 Q. Do you recall what court that was? Ramsey?

23 A. Yes, it was Ramsey County.

24 Q. Do you recall what judge?

25 A. Yes, a Larry Cohen.

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1 Q. Did the case go to a jury?

2 A. No. It was in front of a judge.

3 Q. In front of a judge.

4 How about the other case involving Canterbury,

5 did it go to a jury or judge?

6 A. Judge.

7 Q. What judge, do you recall?

8 A. I don't recall the judge.

9 Q. Do you recall what venue, Hennepin County?

10 A. Ramsey, as well.

11 Q. Ramsey, as well.

12 How about the venue of your other deposition?

13 A. Oh, I really don't recall what the venue of that

14 one was. I assume it was Ramsey County because the

15 deposition was taken in St. Paul.

16 Q. Okay. All right. So I've counted three times

17 you've testified under oath? Two in court and one in

18 deposition?

19 A. One deposition, twice in court, yes.

20 Q. Anything else?

21 A. In terms of -- of affidavits? One case in which

22 I gave an affidavit, which was in fact cited by the

23 Appellate Court in a decision which will be released

24 this Tuesday.

25 Q. What case is that?

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1 A. That is a case which we euphemistically call
2 "Never on Sunday." The Sunday closing law having to
3 do with the Auto Dealers Association.

4 Q. Is that a Minnesota Supreme Court case that's
5 about to be issued?

6 A. That's an Appellate Court.

7 Q. Appellate Court.

8 And you know it's about to be issued and you're
9 cited in it?

10 A. Yes. In fact, I received a copy of it on
11 Friday.

12 Q. Okay. What's the name of the case?

13 A. That's -- there may be others, but I don't
14 recall. I really don't recall.

15 Q. To your recollection are these the four times
16 that you have --

17 A. To my recollection these are the four times.
18 And to my recollection these are the only four
19 times. But I may be mistaken.

20 Q. I understand.

21 Testifying as an expert is something recent in
22 your career; is that right?

23 A. Within the last ten years.

24 Q. Okay. Well, most of these have occurred within
25 the last five years, is that not right?

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1 A. Five to ten. I may be off by a few years, but
2 within -- let's say, to be on the safe side, within
3 the last ten years.

4 Q. Now this morning you believe that you are here
5 as an awareness expert; correct?

6 A. No.

7 Q. You don't -- you don't believe that?

8 A. No. I'm not here as an awareness expert.

9 Q. Okay. And you are not aware that you have been
10 announced in this case, by lawyers who are working
11 for the tobacco companies, as an awareness expert,
12 that's new to you?

13 A. I'm a historian.

14 Q. The question is: Are you aware that you have
15 been announced as an awareness expert?

16 A. No, I am not aware of that.

17 Q. Nobody's ever told you that before?

18 A. No.

19 Q. So you are not here in any way, shape, or form
20 to talk about awareness?

21 A. Oh yes, sorry.

22 MR. PURVIS: Object to the form of the
23 question.

24 THE WITNESS: That is not the question you
25 asked. You asked if I'm an awareness expert.

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1 BY MR. MANNING:

2 Q. We can get into that. Okay.

3 And you're not an awareness expert?

4 A. No. I'm a historian that dealt with the
5 question of awareness.

6 Q. I see.

7 Sir, as a result of your work in this case have
8 you arrived at some opinions?

9 A. Yes, I have.

10 Q. Please tell me each and every one of those.

11 A. Pardon me?

12 Q. Please tell me each and every one of those
13 opinions that you've arrived at as a result of your
14 work in this case. I want you to list them. What
15 are your opinions?

16 A. Well, I think they are listed in the report.

17 And I can summarize that, if you wish, but it's
18 certainly listed in the report.

19 Q. I've read your report, sir, in some detail, it's
20 forty some pages. And it does -- I won't attempt to
21 characterize it. Some historical analysis, you might
22 say, even though some may differ with that. But it
23 doesn't list your opinions.

24 A. Sorry?

25 Q. It does not list opinions.

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1 MR. PURVIS: I object to the question of
2 counsel. Characterization of the report.

3 BY MR. MANNING:

4 Q. Are you saying, sir, that all of your opinions
5 are contained in your report?

6 A. My opinions regarding the findings, historical
7 findings, are in that report. Whether all are in
8 that report, I couldn't say.

9 Q. You can't tell me, as you sit here today, as you
10 arrive to testify in your deposition in this case,
11 whether that report contains all of your opinions
12 that you intend to give in this case?

13 A. It is the bulk of the opinions that I intend to
14 give in this case.

15 Q. What opinions do you have that are not contained
16 in the report?

17 A. I have no additional ones to add at this point;
18 however, they may come up in further research.

19 Q. Now, when is the very first time that you were
20 contacted by anybody on behalf of the tobacco
21 companies to testify for the tobacco companies?

22 A. I believe it was in the late fall or early
23 winter of 1995.

24 Q. Who contacted you?

25 A. It was Dr. Ellen Fitzgerald.

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1 Q. Who is she?

2 A. She is the Executive Director of the University
3 Research Consortium.

4 Q. What did she say to you?

5 A. She asked me whether I'd be interested in doing
6 some historical research in Minnesota history.

7 Q. Did she explain what topic?

8 A. Pardon me?

9 Q. Did she explain what topic?

10 A. Not initially.

11 Q. Okay. Did she explain who you would be working
12 for?

13 A. She mentioned that it was in connection with the
14 Attorney General's case, yes.

15 Q. And she mentioned that she had been contacted by
16 the tobacco companies?

17 A. No.

18 Q. Who did she mention she had been contacted by?

19 A. She had been contacted by Dorsey & Whitney.

20 Q. Tell me everything she said to you in your first
21 conversation. Was it by phone?

22 A. Pardon me?

23 Q. Was it by phone, your first conversation?

24 A. No.

25 Q. Tell me, was it a meeting in her office?

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1 A. No.

2 Q. Your office?

3 A. No.

4 Q. Where was the meeting at?

5 A. We met inadvertently at the Campus Club,
6 University of Minnesota.

7 Q. So it was not a pre-arranged meeting?

8 A. It was not a pre-arranged meeting.

9 Q. So there you were inadvertently at the
10 Campus Club?

11 A. I was not there inadvertently.

12 Q. You met inadvertently?

13 A. That's correct.

14 Q. And what was the conversation between the two of
15 you in its entirety?

16 A. Well, it's a couple of years, so let me try to
17 reconstruct it as best I can.

18 Q. Please do.

19 A. Pardon me?

20 Q. Please do.

21 A. She asked me whether I'd be interested in
22 working with the University Research Consortium on a
23 historical topic having to do with Minnesota history
24 in connection the Attorney General's case. I said
25 I'd have to know more about it.

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1 That's the essence of the conversation at the
2 Campus Club.

3 Q. That's all you can remember about that
4 conversation?

5 A. That's all I can remember of that conversation,
6 yes.

7 Q. What was the next conversation you had with
8 anybody on the topic of being an expert?

9 A. About a week later, approximately, could have
10 been a few days, but a week or so later
11 Dr. Fitzgerald called me and asked me whether I'd be
12 willing to meet with the attorneys from Dorsey &
13 Whitney and other attorneys in connection with this
14 request of her, of me, of course. I said I'm willing
15 to meet with anyone.

16 Q. That was a phone conversation?

17 A. That was a phone conversation.

18 Q. What is her title again, the Executive Director
19 of the University --

20 A. Research Consortium.

21 Q. What does that mean to you? What does she do,
22 do you know?

23 A. She, in fact, runs the University Research
24 Consortium.

25 Q. What is the University Research Consortium as

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1 you understand it?

2 A. The University Research Consortium is a
3 consortium of researchers, faculty members, at the
4 University of Minnesota, organized in this group for
5 the purpose of stimulating and sponsoring -- or
6 stimulating and developing sponsored research.

7 Q. How many professors are a part of it?

8 A. I have no idea. Quite a few. The number, I
9 couldn't say.

10 Q. Have you been a part of it for a number of
11 years?

12 A. I joined the University Research Consortium
13 after Ellen Fitzgerald approached me on this
14 particular instance.

15 Q. What did you need to do to join?

16 A. Pay dues.

17 Q. How many dues do you pay?

18 A. One hundred twenty-five dollars. I'm not sure
19 whether it's annually or every couple of years. But
20 it's -- the payment was a hundred twenty-five dollars
21 at the time.

22 Q. Is there anything else that you pay to them as a
23 result of your work --

24 A. No.

25 Q. -- when they obtain the work for you, so to

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1 speak?

2 A. No. They act as the agent, so to speak; in this
3 case, billing, and other kinds of activities of that
4 kind.

5 Q. So they actually act as the agent by way of
6 billing?

7 A. That's correct.

8 Q. And do they obtain a fee for that, to your
9 knowledge?

10 A. I believe so.

11 Q. And do they obtain a percentage of that fee?

12 A. I don't know exactly what they receive.

13 Q. No idea?

14 A. No.

15 I mean I could find out, but I don't know.

16 Q. Okay. All you know is you get a check from
17 them?

18 A. That is correct.

19 Q. And you then don't get your check from Dorsey or
20 any other law firms, or the tobacco companies
21 themselves?

22 A. That is correct.

23 Q. And do you know who she gets her checks from?
24 Does she get them from the various law firms? Or
25 does she get them from the various tobacco companies?

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1 A. She gets them from the law firms, it's my
2 understanding.

3 Q. You've asked her that?

4 A. Yes.

5 Q. And do you know whether this is a profit center
6 for the University of Minnesota? Do you know how
7 it's run?

8 A. No.

9 Q. You don't know?

10 A. No, I don't.

11 Q. Okay. How many people are on the staff of
12 Dr. Ellen Fitzgerald, do you know?

13 A. I believe she is the only person on the staff.

14 Q. And do you know the impetus for the program?

15 A. Yes.

16 Q. What is that?

17 A. Again, it's my understanding, I wasn't there at
18 the beginning, for the simple reason that historians
19 are never thought of as being lucrative moneymakers
20 in this kind of research. But at the beginning, some
21 five or six years ago, a number of faculty members,
22 regents, professors, from areas of science, medicine,
23 technology, and the hard social sciences, got
24 together to form this group to foster sponsored
25 research.

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1 Q. To foster sponsored research?

2 A. Yes.

3 Q. Is that correct?

4 A. That is correct.

5 Q. And so this organization to foster sponsored
6 research -- it wants to then do research in an
7 objective manner; correct?

8 A. Absolutely.

9 Q. It does not want to be bought in its research?

10 A. That's absolutely correct.

11 Q. It wants to retain an air of objectivity such as
12 is present in the academic institution that's
13 committed to academic freedom?

14 A. Absolutely.

15 Q. And that's your understanding of this
16 organization?

17 A. That is correct.

18 Q. And that's the only basis on which you would
19 participate?

20 A. Absolutely.

21 Q. And the only way you would participate is if you
22 can render an objective opinion that wasn't bought?

23 A. Absolutely.

24 Q. You do not want to be a hired gun or present
25 only a bought opinion?

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1 A. Not in the least.

2 Q. And you want to make sure that when you testify
3 that you look at all sides of every issue?

4 A. Absolutely.

5 Q. And you want to demand a full and complete
6 information before you would render a historical
7 opinion?

8 A. Absolutely.

9 Q. Because to do so, would be less than academic?

10 A. That's correct.

11 Q. It would be less than professional?

12 A. That is correct.

13 Q. And if you found that you did less so, that you
14 yourself, as an academic, did less so, you would
15 admit it?

16 A. Of course.

17 Q. And if you found that you did so, you would back
18 away from opinions you gave and say "I was wrong"?

19 A. If you read my report, it says that these are
20 tentative, subject to further research.

21 Q. We'll talk about your report in great detail.

22 A. But I'm answering your question --

23 Q. Thank you.

24 A. -- in that way. That is, in fact, the way we
25 operate, yes.

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1 Q. Whether it's this report, --

2 A. Or any one.

3 Q. -- this assignment, or any assignment?

4 A. Exactly.

5 Q. So when you testify in a case, you don't feel
6 "I'm taking sides." You're saying, "I'm going to
7 render an objective historical opinion, taking all
8 information into account that may be relevant in this
9 historical analysis"?

10 A. That is absolutely correct.

11 Q. And you are not going to let someone else define
12 that historical analysis for you as an academic;
13 you're going to define it yourself?

14 A. Absolutely.

15 Q. Because that's what you've done in the period of
16 your life as a historian, is you're the one that
17 defines the parameters; correct?

18 A. Yes.

19 Q. The paradigm is yours?

20 A. Uh-huh.

21 Q. Okay. Now you, of course, would never lie to a
22 Court; correct?

23 A. I'm under oath.

24 Q. I understand.

25 A. I would never lie, not only because I'm under

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1 oath, but I would not even if I was not under oath.

2 I would never lie, no.

3 Q. And you would never support lies?

4 A. No.

5 Q. You would not render testimony that was
6 supportive of lying?

7 A. That is correct.

8 Q. And if you found that you were doing so, you
9 would have the integrity to stand up and speak about
10 it?

11 A. Sure.

12 Q. Now, let's talk about your report.

13 A. Okay.

14 Q. Do you have it with you?

15 A. No, I do not.

16 Q. All right. I'll give you a copy.

17 (Exhibit 3135 marked for identification.)

18 BY MR. MANNING:

19 Q. Before we get into your report, sir, let's back
20 up a little bit and finish the history or the story
21 of your involvement here.

22 Now, we were on the second phone call.

23 A. That's correct.

24 Q. Second contact with Ellen Fitzgerald and that
25 was completed, and now a meeting with lawyers was

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1 arranged?

2 A. Uh-huh.

3 Q. Where did the next -- did we exhaust that phone
4 call? Anything else said in it by her or you?

5 A. I think it was during that phone call that she
6 explained, I think, what the historical question that
7 was to be researched.

8 Q. What did she explain?

9 A. In essence, I think she said that the -- that
10 the interest is in doing research as to the -- as to
11 what the people of Minnesota knew regarding the
12 health hazards of smoking, and how they knew it, and
13 when they knew it. That's, I think, how she defined
14 it at the time.

15 Q. Did you take notes of that conversation?

16 A. No, I did not.

17 Q. And how else -- what else was said, please?

18 A. That was about the -- the extent of it.

19 Q. Did you ask questions about that?

20 A. Yes, I did. I asked questions about that. But
21 I don't recall the specifics of what questions I
22 asked.

23 Q. No recollection of what you said?

24 A. No. I just recall the general conversation.

25 Q. Now, did you understand that that was going to

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1 be your assignment, how she defined it?

2 A. I believe that that was going to be generally

3 what the research topic that I would be asked to do,

4 yes.

5 Q. Now, as a matter of principle if the research

6 topic was too narrow you yourself, as the expert,

7 would redefine it; correct?

8 A. Oh no. I would define the topic, of course.

9 But the general, overall question could be defined by

10 the -- by the sponsor.

11 Q. But if the overall general question was defined

12 too narrowly by the sponsor, you, as the

13 professional, would tell them that their question --

14 A. Absolutely.

15 Q. -- was too narrow?

16 A. Absolutely.

17 Q. And you would assist them in redefining it?

18 A. Yes. Or withdraw.

19 Q. Correct.

20 And you would particularly assist them in

21 redefining it if it was defined so narrow as to

22 render your opinion not accurate?

23 A. Uh-huh.

24 Q. Correct?

25 A. Yeah.

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1 Q. Or if it made your historical analysis so narrow
2 that it didn't take into account some of the most
3 important data? You would withdraw?

4 A. Certainly.

5 Q. Now you can't cite me an example of when you've
6 done that before, can you?

7 A. No.

8 Q. And you didn't do that in this case, did you?

9 A. No.

10 Q. Now, after that phone conversation, you had a
11 meeting with the lawyers?

12 A. That is correct.

13 Q. Where did that take place?

14 A. If I'm not mistaken, this very room.

15 Q. And who was present?

16 A. About a dozen lawyers from different firms, from
17 this firm here and from others, as well.

18 Q. Lawyers from all over the country?

19 A. Yes.

20 Q. Do you think there were about a dozen there?

21 A. About a dozen. Maybe ten, maybe fourteen. You
22 know, roughly that.

23 Q. And did they introduce themselves as
24 representing various tobacco companies?

25 A. Yes.

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1 Q. You had full knowledge of that at that time?

2 A. Absolutely, yes.

3 Q. And you knew that you were working for the
4 tobacco companies?

5 A. No. I knew I was working for the lawyers who
6 were working for the tobacco companies.

7 Q. Correct. But you knew that the tobacco
8 companies were paying the lawyers; correct?

9 A. Yes.

10 Q. And you knew that the tobacco companies were
11 going to pay the University of Minnesota Research
12 Consortium?

13 A. They would pay the lawyers, the lawyers would
14 pay the consortium. Yes, I knew that.

15 Q. And that money would come to you?

16 A. That is correct.

17 Q. And so you had full knowledge, at least at that
18 time, if not before, that the money that would
19 ultimately come into your pocket would come from the
20 tobacco companies?

21 A. Yes.

22 Q. Now at that meeting -- how long did the meeting
23 take?

24 A. Approximately an hour, I'd say.

25 Q. What was discussed?

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1 A. Well, essentially what was discussed was the
2 issue of what they were interested in my doing and my
3 response to that particular general question.

4 Q. Tell me everything about that, that you can
5 remember.

6 MR. PURVIS: I'm going to object and caution
7 Professor Berman that the details of conversations
8 with counsel are privileged and are not to be
9 discussed in this deposition.

10 BY MR. MANNING:

11 Q. So the meeting --

12 MR. MANNING: So are you instructing the witness
13 not to answer?

14 MR. PURVIS: I'm cautioning him at this point.
15 And if you ask a question which calls for privileged
16 information to be discussed, I will so instruct.

17 MR. MANNING: Okay.

18 BY MR. MANNING:

19 Q. You were there for about an hour?

20 A. About an hour.

21 Q. What did you say? What do you recall that you
22 said in that meeting?

23 A. To the best of my recollection I asked
24 questions. And I did say -- I do remember this --
25 that I'm coming into this with a bias.

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1 Q. What was that?

2 A. I hoped that the plaintiffs win.

3 Q. Why is that?

4 A. I, too, believed that there was, in fact, a
5 strong case from the public -- I didn't do any
6 research on this -- from the public information
7 regarding the complicity of the tobacco companies and
8 the health questions, yes.

9 Q. You believed that?

10 A. Pardon?

11 Q. You believed that when you came to the meeting?

12 A. Right.

13 Q. Before you walked in the door?

14 A. That is correct.

15 Q. And you announced that in the meeting?

16 A. Yes.

17 Q. What else did you say in that meeting?

18 A. I said that I would be very interested in
19 looking at preliminary evidence regarding the
20 historical questions and then make up my mind whether
21 I would take on this assignment after seeing that.

22 Q. So you wanted to look at preliminary evidence?

23 A. That is to say I wanted to read some general
24 materials, the -- well, the basic complaint, and the
25 materials that -- general accounts of the various

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1 issues. And I wanted to do some preliminary research
2 myself before agreeing to accept the position.

3 Q. Okay. What did they say? What was said when
4 you announced that you had a bias for the
5 plaintiffs?

6 MR. PURVIS: I am going to object and instruct
7 Professor Berman that this calls for privileged
8 communications, and direct him not to answer.

9 Further, it's my understanding that there is a
10 general agreement among counsel that the details of
11 conversations with counsel would not be inquired
12 into.

13 I just want to see if that's your
14 understanding.

15 MR. MANNING: You instruct according to the
16 Court Order, counsel.

17 If you want to talk about this off the record,
18 I'll talk about it. Otherwise let's proceed with the
19 deposition.

20 I assume you're aware with the most recent Court
21 Order. If you're not, I'll discuss it with you at a
22 break.

23 BY MR. MANNING:

24 Q. Did you receive any materials to read during
25 that meeting?

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1 A. Yes.

2 Q. What did you receive?

3 A. I received the original complaint, the
4 Attorney General's complaint.

5 Q. Did you read it before the meeting?

6 A. No. After the meeting.

7 Q. Okay. What else did you receive in that
8 meeting?

9 A. Nothing at that particular point.

10 Q. That's all you had?

11 A. From that meeting, yes.

12 Q. And did you articulate your bias any further
13 than what you've explained to me?

14 A. No.

15 Q. Pardon me?

16 A. No.

17 Q. That's all?

18 A. That's all.

19 Q. What exactly did you say about your bias?

20 A. Just that I'm coming into this with a bias
21 that -- for the plaintiff, period.

22 Q. Did you explain why?

23 A. Yes.

24 Q. Why?

25 A. I said that I, too, believed popular view that

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1 the tobacco companies are culpable, period.

2 Q. And why did you say that?

3 A. I assume you would know why I would say

4 that. General --

5 Q. No.

6 A. The general climate of opinion is that -- in
7 that direction, obviously.

8 Q. That's your view?

9 A. Yes.

10 Q. And that was your view at the time in 1995?

11 A. At the time, yes.

12 Q. General view or the popular view?

13 A. Right.

14 Q. What was the reason that you said that, you as
15 an individual?

16 A. I wanted the attorneys to know where I'm coming
17 from.

18 Q. Why were you coming from that direction? You as
19 an individual?

20 A. Well, very simply, I come at it the same way
21 that other people without -- at first, at that point,
22 without general knowledge, and specific knowledge of
23 it, and that is from the press accounts and the
24 historical development of culture and experience that
25 lead one to this kind of bias.

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1 Q. What else did you receive besides the original
2 complaint in that meeting then?

3 A. That's it.

4 Q. And --

5 A. To the best of my recollection, that was it.

6 Q. Did you then agree to have a second meeting?

7 A. I believe that was the only meeting we had, yes.

8 Q. You didn't have another meeting after you did
9 your preliminary research?

10 A. Not with the lawyers.

11 Q. Who -- what was the next meeting you had with
12 anybody after that meeting with lawyers?

13 A. None. I had no meeting before it was -- I had
14 no meeting, no.

15 Q. No meetings with anybody?

16 A. No.

17 Q. Did you have any telephone conversations?

18 A. Yes.

19 Q. With who?

20 A. With Ellen Fitzgerald.

21 Q. Anyone else?

22 A. Pardon me?

23 Q. Anyone else?

24 A. No. That was it.

25 Q. Was she talking to the lawyers?

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1 A. I assume she was.

2 Q. She was the go between?

3 A. I assume she was.

4 Q. How many times did you talk to her?

5 A. A few. I couldn't say what it was. It was more
6 than one. Fewer than five.

7 Q. After your meeting with the lawyers did you
8 report to her about what happened?

9 A. She was present.

10 Q. She was present at the meeting --

11 A. That's correct.

12 Q. -- with the lawyers?

13 A. That's correct.

14 Q. What did she say in the meeting?

15 A. I don't recall. I don't think she said
16 anything. But I don't recall.

17 Q. After the meeting you met with her alone, either
18 by telephone or in person?

19 A. By telephone. By telephone.

20 Q. What did you say in that first phone
21 conversation about your meeting with the lawyers?

22 A. I don't think she said anything about the
23 meeting.

24 Q. What did you say?

25 A. She wanted to know whether I -- this was whether

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1 I agreed to accept the assignment.

2 Q. She was at the meeting?

3 A. Yes.

4 Q. And she knew whether you agreed or not to --

5 A. No, I didn't agree at the meeting at all.

6 Q. So in the next phone conversation who initiates

7 it, you or her?

8 A. She did.

9 Q. And how long after the meeting with the lawyers?

10 A. Maybe a week or two afterwards.

11 Q. And what did you say to her?

12 A. I said that I've examined the historical
13 material, that I had gone to the library to look at.

14 And I'm convinced that there is in fact a viable
15 research topic there and I'd be willing to do it.

16 Q. So in one week or two weeks after your meeting
17 with the lawyers you agreed to take the assignment?

18 A. That is correct.

19 Q. And you agreed to take the assignment as it had
20 been defined to you by Ellen Fitzgerald?

21 A. No.

22 Q. As it had been defined to you in your meetings
23 with the lawyers?

24 A. No.

25 Q. As it had been refined by you --

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1 A. That is correct.

2 Q. -- in one week?

3 A. That is correct.

4 Q. In one week or two?

5 A. In one week or two, yes.

6 Q. In that one week or two exactly what did you do?

7 A. I read quite a few general accounts of the -- of
8 the tobacco industry. Of the issues of -- of public
9 health. These are just general accounts. And looked
10 at some newspaper -- back files of newspapers at
11 Wilson Library. And came to the conclusion that
12 there was, in fact, a viable research project in this
13 particular question.

14 Q. Now do you have a file on this, sir?

15 A. Pardon me?

16 Q. Do you have a file? Did you maintain a file on
17 this case?

18 A. Not on this, no.

19 Q. You don't maintain a file on this matter?

20 A. Not really. I'm probably the most disorganized
21 person in the world. I don't maintain files.

22 Q. So what you're telling this jury is that you
23 cannot go back to your office and show them what you
24 did from the time of your meeting with the lawyers
25 and Ellen Fitzgerald, until the time that you agreed

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1 to take the assignment, you can't tell us what you
2 read?

3 A. I could roughly tell you, but I can't tell you
4 on the basis of any kind of written kind of --

5 Q. And you can't go find it for us? You can't
6 reconstruct it? You don't have notes that say these
7 are the five, the ten, the twenty articles I read; is
8 that correct?

9 A. I can reconstruct it from memory. But I can't
10 do it from any kind of...

11 Q. Tell me then, from memory.

12 A. From memory.

13 Q. That's the only way you can do it? You can't go
14 back to your office and do it; is that right?

15 A. Not at all.

16 Q. Do you have a file on this back at your office?

17 A. Not at all.

18 Q. You have no file?

19 A. Not at all.

20 Q. So you're telling me the only thing you have is
21 this report? Did you keep a copy?

22 A. Oh no. I have six file drawers of documents and
23 materials. But I have no -- no -- no written notes
24 and files of that kind.

25 Q. Six file drawers of -- of materials related to

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1 this report?

2 A. That is correct.

3 Q. Okay. And in those six file drawers are some,
4 if not all of the documents that you reviewed in
5 those first two weeks; correct?

6 A. Probably.

7 Q. And so if we had those here you could go through
8 and be much more accurate than your memory by showing
9 me which ones you reviewed in that first week or two
10 weeks; correct?

11 A. Oh, I could do that, yes. But -- but, again, it
12 would not be fully accurate because my memory may not
13 be able to reconstruct everything.

14 Q. No, I understand. But your memory, you would
15 agree with me, is likely better looking at all of
16 those documents in the six file drawers and picking
17 them, than it is doing it here from complete memory
18 alone?

19 A. That is correct.

20 MR. MANNING: Okay. Counsel, you had an
21 obligation to bring those six file drawers. You
22 should be able to do that right now. So I expect
23 that --

24 THE WITNESS: Actually I could do it by looking
25 at the bibliography.

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1 MR. MANNING: Hold on.

2 So I expect that that be done by end of lunch,
3 or tomorrow morning, or we're not going to obviously
4 be able to finish the deposition.

5 MR. PURVIS: It will not be done because we have
6 provided to you the documents Professor Berman has
7 relied on. They are cited in his expert report, and
8 he has reviewed, as stated in his expert report,
9 hundreds of thousands of other documents and pages,
10 which he is not relying on, otherwise they would have
11 been cited in his report.

12 MR. MANNING: What documents are you referring
13 to, counsel, that you provided me? The documents
14 you provided me this morning?

15 MR. PURVIS: The ones that are cited in the
16 report are the documents that he is relying on.

17 MR. MANNING: What documents are you referring
18 to that you provided me? So the record is clear. Is
19 that the documents that are about a half-inch thick
20 right here?

21 MR. PURVIS: No. The ones that are cited in his
22 report are the documents that he is relying on.

23 MR. MANNING: But you understand that you
24 haven't provided those to me? So you're not
25 misstating for the record.

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1 MR. PURVIS: I don't believe there's an
2 obligation, under the record, for us to provide
3 documents at this time.

4 MR. MANNING: That's fine.

5 BY MR. MANNING:

6 Q. From your memory -- now these six file drawers,
7 they're right over here at the University of
8 Minnesota in your office?

9 A. No, they are not.

10 Q. Where are they, in your house?

11 A. That is correct.

12 Q. Where is your house?

13 A. Minneapolis.

14 Q. Whereabouts?

15 A. West Bank.

16 Q. So it's close?

17 A. Yes.

18 Q. And you have an office there?

19 A. I wouldn't call it an office, no.

20 Q. It's where you work?

21 A. Yes.

22 Q. It's where these six file drawers are?

23 A. That's correct.

24 Q. And in those six file drawers you believe are

25 most, if not all of the documents that you reviewed

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1 in that first week or two?

2 A. I would think so.

3 Q. From memory, what did you review in that first
4 week or two before agreeing to take this assignment?

5 A. I read "The Social History of Tobacco" by
6 Robert Sobel.

7 Q. Robert Soho?

8 A. Sobel.

9 Q. S-O- --

10 A. If you want, -- it's cited here in the
11 bibliography.

12 Q. All right.

13 A. I looked at some articles having to do with --
14 oh, I reviewed the -- the surgeon general's reports.

15 Q. How many?

16 A. The '64 one primarily.

17 I reviewed a number of --

18 Q. Let's be clear.

19 You reviewed the surgeon general's '64 report?

20 A. '64 report.

21 Q. Did you review any other ones?

22 A. Not at that particular time.

23 Q. Thank you.

24 Go ahead.

25 A. Some articles and various different journals,

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1 but most particularly in the consumer reports of the
2 1940s and '50s, and the Reader's Digest of the
3 1950s. That's to the best of my recollection.

4 Q. Okay. So "The Social History of Tobacco" by
5 Robert Sobel. Surgeon general's report of '64. Some
6 articles in journals on what?

7 A. On -- essentially on the health risks of
8 tobacco, yes.

9 Q. Okay. You don't recall how many, or what year,
10 or any of those details?

11 A. Ranging in time frame from the '30s through the
12 '60s.

13 Q. '30s through '60s.

14 A. And the number I couldn't say.

15 Q. And then some Reader's Digest articles?

16 A. Well, the Reader's Digest articles would, of
17 course, be included in that '30s to '60s.

18 Q. Okay. Anything else?

19 A. There may be others, but that's about it.

20 Q. At that point in time, then, you agreed to work
21 for the tobacco companies?

22 A. No.

23 Q. Work for the lawyers?

24 A. That is correct.

25 Q. But ultimately always with the full and complete

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1 knowledge that the money that would go into your
2 pocket would be from the tobacco companies?

3 A. That is correct.

4 Q. Okay. So you then agreed to do that?

5 A. Yes.

6 Q. Did you call Ellen Fitzgerald and tell her?

7 A. No. She called me.

8 Q. She wanted to know the answer?

9 A. That's correct.

10 Q. Did she tell you the lawyers were calling her?

11 A. No.

12 Q. Okay. What did you tell her?

13 A. I told her that it's a viable research project,
14 that I'd be willing to do it, yes.

15 Q. Did you tell her the -- what was the research
16 project now, as you understood it?

17 A. As I understand the research project, it was to
18 ask the question of the -- the extent to which the
19 knowledge of health risks of smoking were known by
20 the people of Minnesota over the years. And the
21 means by which they knew them.

22 And a secondary kind of question came as to the
23 public policy that was involved in and around the
24 issue of health and smoking.

25 Q. What was the public policy issue?

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1 A. The question of what in fact -- the legislative
2 or executive actions taken by the State over time.

3 Q. And that was the question?

4 A. Yes.

5 Q. And you were now comfortable researching that
6 question?

7 A. I was comfortable with that question, yes.

8 Q. And you did not determine that that question was
9 too narrow?

10 A. No.

11 Q. You did not determine that that question was --
12 would lead to an opinion that wasn't objective?

13 A. No.

14 Q. And your bias that you had walked into the room
15 with here -- right here that we're in, on the
16 fourteenth floor of the Dorsey law firm, two weeks
17 before that call, was now gone after you had reviewed
18 these materials?

19 A. On that particular issue it was, in fact, in
20 question.

21 Q. So now your bias was no longer a bias. Now you
22 were neutral?

23 A. That is correct.

24 Q. So in two weeks, after this reading that you've
25 described to me, you're back to neutral?

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1 A. That's correct. On that particular question.

2 Q. On this particular question --

3 A. That's correct.

4 Q. -- that you've articulated, which is: To
5 understand the knowledge of the health risks of
6 smoking by Minnesotans and the means by which they
7 knew; correct?

8 A. That's correct.

9 Q. I've correctly articulated the question?

10 A. Yes.

11 Q. Now, you then embarked on further research on
12 that question?

13 A. Yes.

14 Q. Correct?

15 A. Yes.

16 Q. And that resulted in you writing this report?

17 A. That's correct.

18 Q. Did you write this report in its entirety?

19 A. Yes, I did.

20 Q. Pardon me?

21 A. Yes, I did.

22 Q. Did you send drafts of it to anybody?

23 A. No.

24 Q. Never?

25 A. Never.

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1 Q. No one else had any input into this report?

2 A. Oh yes.

3 Q. Tell me about that.

4 A. My research assistants.

5 Q. Who were they?

6 A. David Ryden and Michael Zis.

7 Q. Z-I- --

8 A. Z-I-S.

9 Q. And David Ryden?

10 A. Ryden. R-Y-D-E-N.

11 Q. Are they students in the History Department at
12 the U?

13 A. David is and Michael is a student in political
14 science.

15 Q. Ph.D candidates?

16 A. Yes.

17 Q. Are you their advisor?

18 A. No.

19 Q. Do they still work for you?

20 A. Yes.

21 Q. How long have they worked for you?

22 A. For approximately a year and a half, I'd say.

23 Q. Did they assist you in the writing of this
24 report?

25 A. Yes.

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1 Q. Who would you say wrote the bulk of the report
2 between the three --

3 A. I did.

4 Q. -- between the three of you?

5 A. I did.

6 Q. Who wrote the first draft of the report?

7 A. Both Michael and David put together a --

8 independently of each other, a first draft, which I
9 reviewed.

10 Q. You did not put together independently a first
11 draft?

12 A. No, I did not.

13 Q. You took their two first drafts?

14 A. (Nodding.)

15 Q. Did you review them?

16 A. Yes.

17 Q. Each?

18 A. Together. Yes.

19 Q. Had they been put together, so to speak? Had
20 they taken their --

21 A. No.

22 Q. -- two drafts --

23 A. Each. But I reviewed them at the same time.

24 Q. Okay. How long was each report?

25 A. In what sense, how long?

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1 Q. Pages.

2 A. Oh, approximately a dozen.

3 Q. Each had approximately a dozen pages?

4 A. Approximately. Maybe less. Maybe a little bit
5 more.

6 Q. You took those two reports, each a dozen pages,
7 approximately, and put them together in your ultimate
8 report?

9 A. Modifying them, I put them together, yes.

10 Q. Modified?

11 A. Modified -- I used them as a basis for further
12 development of the report, yes.

13 Q. Okay. So you edited their work?

14 A. Added to it, as well.

15 Q. And you added to it?

16 A. Yes.

17 Q. How much time did they spend in reading and
18 research, to your knowledge?

19 A. Quite a -- quite a lot.

20 Q. What was that?

21 A. Hundreds of hours.

22 Q. Do you have records of that?

23 A. I do not, no.

24 Q. Do they?

25 A. I believe they may.

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1 Q. They got paid for their time?

2 A. Yes, sir.

3 Q. Again, through this -- this Ellen?

4 A. That's correct.

5 Q. In other words, you didn't pay them?

6 A. No.

7 Q. They were paid by the University of Minnesota
8 Research Center?

9 A. Research Consortium.

10 Q. Research Consortium.

11 And so they submitted their hours to her?

12 A. That is correct.

13 Q. So it would be a matter of record?

14 A. Yes.

15 Q. It would be very easy to obtain?

16 A. Yes.

17 Q. Do you know how many hours you have spent
18 yourself since the time of that --

19 A. I could estimate that. I couldn't give you an
20 exact figure.

21 Q. But Ellen knows that?

22 A. Yes.

23 Q. And what is it, to your knowledge?

24 A. I'd say it's roughly four hundred hours. Maybe
25 five hundred. But it was quite a bit.

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1 Q. Four to five hundred hours?

2 A. Yes.

3 Q. And how about for each of David and Michael,

4 what's your estimate?

5 A. Probably more than I put in.

6 Q. So you would think that each of them put in more

7 than four or five hundred hours?

8 A. Probably. I'm not sure. I couldn't say.

9 Q. Did the three of you sit and discuss this topic?

10 A. Yes.

11 Q. Frequently?

12 A. I'd like to know what you mean by discuss it?

13 Q. How many times did the three of you sit and

14 discuss it, would you say, in the course of this

15 assignment? Would you sit and discuss it, would you

16 say, six times? Ten times? Twenty? What's your

17 estimate?

18 A. Well, it's hard to answer that question for the

19 simple reason that we came together weekly to discuss

20 the research and the research progress.

21 Q. Okay.

22 A. If that's what you mean by discussing, then it

23 was weekly.

24 Q. So the -- so the three of you came together --

25 where did you come together weekly, at your house?

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1 A. At my office sometimes, my house sometimes.

2 Q. Where's your office?

3 A. At the University of Minnesota.

4 Q. In what building?

5 A. Social Science Tower.

6 Q. And you had a regular standing weekly meeting

7 with these two gentlemen?

8 A. Not regularly standing.

9 Q. You would schedule it each week?

10 A. That's correct.

11 Q. Did your secretary do that? Did you do that?

12 A. I have no secretary.

13 Q. So you would do it yourself?

14 A. That's correct.

15 Q. And the drafting of the report went on over what

16 period of time? A year?

17 A. No, no. The drafting of the report went on for

18 a period of about a month, month and a half.

19 Q. So you met once a week during that month and a

20 half?

21 A. Roughly, yes.

22 Q. And so you told me, as I recollect, that you met

23 in the fall of '95 for the first time with Ellen?

24 A. That's correct.

25 Q. When is the report finished, then?

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1 A. July 1, '97. I believe it's -- the date is on
2 the report.

3 Q. What I'm trying to understand is when you met
4 with Ellen in the fall of '95, shortly thereafter you
5 had the meeting with the Dorsey lawyers?

6 A. Yes.

7 Q. You then took two weeks to decide that in your
8 opinion there was a viable research question?

9 A. Yes.

10 Q. We're now in November of '95?

11 A. Yeah, I would say roughly that.

12 Q. You then embark on the research?

13 A. Yes.

14 Q. These two gentlemen assist you?

15 A. Not initially.

16 Q. When did they begin to assist you?

17 A. David probably in -- later that winter. And
18 Michael in the spring.

19 Q. So for how long did you work by yourself?

20 A. Probably two months.

21 Q. What did that entail? Background reading?

22 A. Background. Mostly background reading.

23 Q. Any writing?

24 A. No.

25 Q. How do you write? Do you write on the computer?

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1 A. I certainly do.

2 Q. That's how you write?

3 A. Yes.

4 Q. Did you do any writing during that time?

5 A. No.

6 Q. Were you taking notes?

7 A. No.

8 Q. Did you use Post-Its? Do you highlight
9 materials that you want to go back and look at?

10 A. Not really. I don't recall having -- using
11 Post-Its. I don't generally use Post-Its.

12 Q. When you do your research and you read --

13 A. Uh-huh.

14 Q. -- articles, do you have a need to go back and
15 reference them?

16 A. Yes, on occasion.

17 Q. Do you mark them when you read them --

18 A. Yes.

19 Q. -- as to something that you think is important?

20 A. Yes.

21 Q. How do you do that?

22 A. Actually, on this particular project, I didn't
23 do that.

24 Q. Who did?

25 A. David and Michael.

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1 Q. So you did no marking of background materials?

2 A. No. No.

3 Q. How did they do it, do you know?

4 A. On -- at my direction, they looked at what I
5 thought to be pertinent, and they are very
6 knowledgeable historians and political scientists and
7 they had their own training and, therefore, could
8 make independent judgments of what is a valuable
9 source to look at. I double-checked them and --
10 essentially.

11 Q. Did you do the global reading and tell them what
12 to read?

13 A. Yes.

14 Q. And so they read within the parameters you
15 defined?

16 A. Absolutely.

17 Q. And how did they mark things they read, because
18 you said you didn't. Did they note them on the
19 computer? Did they have notes?

20 A. No. We had photocopies of all documents that we
21 used. And they put together what -- essentially
22 compilations of significant documents which I
23 reviewed.

24 Q. So they would write a compilation of a
25 significant document?

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1 A. They would write a compiled --

2 Q. Would they write a summary?

3 A. No.

4 Q. Did they note portions of the document?

5 A. Yes.

6 Q. Okay. So they would note --

7 A. By underlining or highlighting.

8 Q. So they would underline or highlight and then

9 they would copy that page or two pages from an

10 article?

11 A. If it's an article, they'd have the whole
12 article in there.

13 Q. Okay. If it was a book, they'd copy the pages?

14 A. From a book, it would be pages.

15 Q. Pages?

16 A. Yes, pages.

17 Q. If it was a copy of other things, a long thing,
18 like the surgeon general's reports, or Food and Drug
19 Administration comments, or something --

20 A. That -- they would not highlight that. That
21 would be, of course, done through newspaper accounts.

22 Q. Newspaper accounts of the surgeon general's
23 report?

24 A. That's correct.

25 Q. So you wouldn't go and verify the precise

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1 wording of the surgeon general reports?

2 A. Oh yes.

3 Q. You would?

4 A. If it were pertinent and necessary, yes.

5 Q. You didn't do it as a matter of course?

6 A. No.

7 Q. If you felt it was pertinent, you would go read

8 it; otherwise you based your analysis of the surgeon

9 general's reports on newspaper accounts of them;

10 correct?

11 A. Some surgeon general reports I read through

12 entirely.

13 Q. Uh-huh.

14 A. Most were based on reading of newspaper and

15 journal accounts.

16 Q. So when you cite the surgeon general's report in

17 your expert report here, sometimes you read the whole

18 one, and most times you're referring to newspaper

19 accounts that referenced the surgeon general's

20 report?

21 A. No.

22 Q. Tell me where I'm wrong.

23 A. When a surgeon general's report is cited in this

24 report, it's a report that I have read.

25 Q. It's a report that you've read?

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1 A. That's correct.

2 Q. In its entirety?

3 A. In its entirety.

4 Q. They would highlight and make copies, or
5 underline and make copies, of anything that was
6 longer than an article?

7 A. Uh-huh.

8 Q. Correct?

9 A. Yes.

10 Q. And you would read the underline or the
11 highlight?

12 A. Yes.

13 Q. And from that you would cite to it?

14 A. Yes.

15 Q. And do you have the copies of those underlined
16 and highlighted things in those six file drawers?

17 A. I'm sure I do, yes.

18 Q. All right. And that's the basis of your
19 opinion, is the underlining and the highlights of
20 those articles that you have cited; the very specific
21 basis is the underlining and the highlights, correct?

22 A. Among other things, yes.

23 Q. Correct.

24 But that's what you read from what they did, --

25 A. Uh-huh.

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1 Q. -- from which you then formulated your opinions;
2 correct?

3 A. In part, yes.

4 Q. Now, you tell me for about two or three months
5 you do some background reading and then you start
6 telling them what to read; right? Roughly?

7 A. Yes.

8 Q. So now we're in the spring or the summer of '96
9 and you've directed their reading material?

10 A. Uh-huh.

11 Q. And once they start reading do you tell me that
12 they complete their project in six weeks?

13 A. No.

14 Q. I misunderstood. I'm trying to understand. I
15 had some --

16 A. What -- your arithmetic may be faulty. Six
17 weeks from '96.

18 Q. I'll correct my -- I had some understanding that
19 you told me that you met with these gentlemen on a
20 weekly basis for about six weeks. When you were --

21 A. That wasn't in '96.

22 Q. I'm sorry?

23 A. That was not in '96.

24 Q. When was that?

25 A. That was in '97.

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1 Q. Was that in the finalization of the report?

2 A. That is correct.

3 Q. So the reference that you made earlier to the
4 six week meetings with them, where you met every
5 week, that was when you -- the three of you were
6 finalizing the report?

7 A. No.

8 Q. Tell me where I'm wrong.

9 A. Yes.

10 We met every week even before that.

11 Q. Okay. So from the time they started in the
12 spring of '95, and the summer of -- did one start in
13 the spring of '95 and one in the summer of '95?

14 A. Roughly.

15 Q. And from the time they started you met every
16 week?

17 A. That is correct.

18 Q. And you were discussing what they were reading?

19 A. Uh-huh.

20 Q. Correct?

21 A. Yes.

22 Q. And --

23 A. What they were researching, as well. Not only
24 reading.

25 Q. And what they were researching?

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1 A. Yes.

2 Q. How do you make the distinction?

3 A. Reading is reading documents that have already
4 been uncovered. Researching is going out and
5 discovering what's there.

6 Q. And that's what you think is the responsibility
7 of a historian, --

8 A. That is correct.

9 Q. -- or a political scientist, is not to just read
10 what's there, but what makes you a historian is that
11 you will go out and research what just doesn't roll
12 across in front of you?

13 A. Absolutely.

14 Q. You will ask for new documents?

15 A. Uh-huh.

16 Q. Correct?

17 A. Whatever is out there, yes.

18 Q. Whatever is out there you want to read?

19 A. Yes.

20 Q. Because if you don't read whatever is out there,
21 you may end up looking silly as an academic; correct?

22 A. It has to be pertinent, though.

23 Q. Oh absolutely. It has to be pertinent; right?

24 A. Yes.

25 Q. But if it's pertinent, and you as an academic

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1 don't ask for it, and look at it, then you could look
2 silly, right?

3 A. Yes.

4 Q. In fact, you've published in peer-review
5 literature, right?

6 A. Oh absolutely.

7 Q. You've sat on peer-review committees, --

8 A. That's correct.

9 Q. -- where you have reviewed your colleagues's
10 peer review work; correct?

11 A. Yes.

12 Q. There have been times when you, as a
13 peer reviewer have said to a colleague, a historian,
14 "You didn't scratch the surface enough. You have to
15 go scratch more because that source out there, you've
16 got to go read in that area before you can come back
17 here on this question and opine or pontificate or
18 publish to the world and be an objective historian --
19 you've got to read in that area, too"; you've done
20 that as a peer reviewer, haven't you?

21 A. I don't recall having done that. But I could
22 have done that.

23 Q. Would you do it, if in fact it was relevant and
24 important and pertinent material that someone should
25 read?

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1 A. That's hypothetical, but I assume I would.

2 Q. Has anyone ever done that to you?

3 A. Not to my knowledge. Not to my recollection.

4 Q. No one to your recollection has ever told you to
5 read more?

6 A. That's correct.

7 Q. But you don't disagree with what I'm saying, as
8 a fundamental basis of academic freedom and academic
9 integrity?

10 A. No, I don't disagree with that at all.

11 Q. What you don't disagree with is that you should
12 read all pertinent documents and pertinent sources
13 that bear on a question?

14 A. Absolutely. Yes, I agree with that.

15 Q. Okay. Now, you met every week?

16 A. Uh-huh. Yes.

17 Q. There's lots of conversation?

18 A. Pardon me?

19 Q. So there are many conversations that the three
20 of you had?

21 A. Yes.

22 Q. Many?

23 A. (Nodding.)

24 Q. Correct?

25 A. Too many for me to recall them all.

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1 Q. I'm sure.

2 And at the time that you were doing this
3 research, were you reading the Wall Street Journal?

4 Do you read the Wall Street Journal?

5 A. On occasion, yes.

6 Q. Did you read it religiously on tobacco
7 litigation?

8 A. Not the Wall Street Journal religiously on
9 tobacco litigation, no.

10 Q. Did you read the New York Times?

11 A. Yes.

12 Q. You did?

13 A. Yes.

14 Q. Every day?

15 A. I subscribe to the New York Times.

16 Q. Did you make it a habit that because you were
17 researching in a certain area, such as this question
18 that you've articulated that you should research,
19 that you were researching, did you make it a habit
20 that you would read every day?

21 A. Of course.

22 Q. The New York Times?

23 A. I read -- I make it a -- a habit to keep up with
24 the news, newspapers, because it is part of my
25 responsibility as a historian to be acquainted with

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1 what's going on now, as well as the past.

2 Q. Do you make it a habit to read specifically in
3 the area of tobacco?

4 A. I read specifically on all areas, Middle East
5 Crisis, the Congressional log jam, and tobacco.

6 Q. And you did that in the New York Times?

7 A. Yes.

8 Q. Not in the Wall Street Journal?

9 A. I may have read the Wall Street Journal a couple
10 of times.

11 Q. That wasn't your paper of choice?

12 A. But it's not a paper I generally receive,
13 although I've been cited and quoted in it.

14 Q. But the Times is your paper of choice?

15 A. That is correct.

16 Q. How about David and Michael, do you know?

17 A. Pardon me?

18 Q. How about David and Michael, do you know what
19 they read on a daily basis?

20 A. I have no idea.

21 Q. What's your memory, best you can tell me, of --
22 a lot of conversations with you and David and
23 Michael, but I'd like you to just tell me, as you sit
24 here, what your memory is of those conversations.

25 And I'll listen, but your best memory of all of

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1 them.

2 A. Should I characterize them all? Is that what
3 you're asking me to do?

4 Q. Characterize, summarize, and those things that
5 you have specific recollection of as you sit here,
6 I'd like to hear.

7 A. Well, I think the major thrust of our weekly
8 meetings was to make sure that we covered all of the
9 areas of research that we had to do. All the
10 archives, all the public collections. And the -- to
11 get a report on what was done.

12 Q. What else? I'm asking you in front of this
13 jury, sir. Basically you're telling me the three of
14 you met at least thirty times or more; correct?

15 A. Yes.

16 Q. I'm asking you, and I'm going to sit and write,
17 you can talk as long as you want, whether it's a half
18 hour, fifteen minutes, or however long your memory
19 is, to tell me all about these conversations that you
20 had.

21 MR. PURVIS: Object to the form of the
22 question.

23 THE WITNESS: Yes.

24 MR. PURVIS: You may answer.

25 THE WITNESS: Oh, okay.

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1 Well, "David, what did you find in the -- in the
2 Minnesota Historical Society when you looked at the
3 records of the -- of the Minnesota Health
4 Department?"

5 David would respond, "I found this, that, and
6 the other thing."

7 "Michael, what did you look at when you went to
8 the Legislative Reference Library? What did you find
9 when you listened to the tapes of the hearings on the
10 various tobacco issues before the House and the
11 Senate of the legislature?"

12 "David, what was at the Social Welfare Archives
13 that I didn't know about?"

14 "How far have you gotten, David, in doing
15 research in the Minneapolis Star?"

16 "Are there any problems, David, in finding
17 further materials in the -- in the University
18 archives?"

19 "Have you contacted the Mayo Library yet?"

20 Those are the kinds of questions that came up.
21 If -- you know. I may have mentioned other
22 depositories, other archives, other collections. But
23 those were, in fact, the nature of our conversations.

24 BY MR. MANNING:

25 Q. What other archives or collections do you

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1 recollect that you may have mentioned?

2 A. The -- the state archives that are held by the

3 Minnesota Historical Society. The gubernatorial

4 papers that are sometimes at the Minnesota Historical

5 Society, sometimes in private areas outside. The

6 Diehl Library at the University of Minnesota, which

7 is the biomedical library.

8 I mean we exhausted whatever was in the public

9 domain.

10 Q. Did you -- you exhausted whatever was in the

11 public domain?

12 A. That is correct.

13 Q. And did you make a decision not to go beyond the

14 public domain?

15 A. Yes.

16 Q. Why was that, sir?

17 A. Because the nature of the question that I was

18 looking at.

19 Q. And what was that?

20 A. The nature of the question was what did the

21 people know.

22 Q. And you made a decision that what the people

23 know can only be judged or impacted by what's in the

24 public domain; is that right?

25 A. That's what the people know, yes.

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1 Q. You made that decision, as a historian --

2 A. As a historian, I made that decision, yes.

3 Q. And as a historian, as a professional, you were
4 comfortable that to make some decision about what the
5 people knew, you only had to look at what was in the
6 public domain?

7 A. That is correct.

8 Q. Did you ever have -- conduct one interview of
9 anyone in the public domain?

10 A. No.

11 Q. To see what they knew?

12 A. No.

13 Q. So when you intend to offer an opinion about
14 what people knew, so we're clear for the record, you
15 never once went and talked to a person about what
16 they knew?

17 A. No.

18 Q. You didn't interview an 85-year-old; correct?

19 A. No.

20 Q. You didn't interview a 75-year-old; correct?

21 A. No.

22 Q. You didn't interview a 65-year-old?

23 A. No.

24 Q. And you didn't interview a 25-year-old?

25 A. No.

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1 Q. Likewise, you didn't interview anybody at the
2 tobacco companies, did you?

3 A. No.

4 Q. And you didn't ask to?

5 A. No.

6 Q. And to this day, sir, have you ever reviewed one
7 document of the tobacco companies?

8 A. No.

9 Q. And do you know, sir, that I provided a document
10 designation of documents that I intend to show you
11 here in your deposition today and tomorrow?

12 A. I understand that you have such a list.

13 Q. Has that list been shown to you?

14 A. Just numbers. They mean nothing to me.

15 Q. Did the documents -- were the documents shown to
16 you?

17 A. No.

18 Q. But you know full well that I intend to show you
19 those documents; correct?

20 A. Please.

21 Q. But you understand that?

22 A. Yes, I do.

23 Q. But no one has chosen to show you those
24 documents --

25 A. That is correct.

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1 Q. -- before coming in here today?

2 A. That is correct.

3 Q. And you didn't ask to see them?

4 A. No, I didn't ask to see them.

5 Q. And at the time that you were doing your
6 research you did not ask to have one interview with
7 one person from the tobacco companies, as a
8 historian; correct?

9 A. That is correct.

10 Q. And as a historian you did not ask to go and
11 say, "I'd like to understand this issue from the
12 perspective of the tobacco industry," did you?

13 A. No.

14 Q. You knew that there were groups that represented
15 the tobacco companies as an industry; correct?

16 A. Yes.

17 Q. But you, nonetheless, not only didn't go to each
18 individual tobacco company, you did not go to the
19 entities that represented the industry; correct?

20 A. That is correct.

21 Q. And so, as we sit here today, you have not
22 reviewed one document on tobacco company stationery?

23 A. That's correct.

24 Q. Nor have you reviewed a summary of those
25 documents, have you?

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1 A. No.

2 Q. And you haven't asked to do that?

3 A. No, I have not.

4 Q. So after you and David --

5 Are you a smoker?

6 A. Not now, no.

7 Q. Did you smoke?

8 A. Yes, I did.

9 Q. For how long?

10 A. Forty years.

11 Q. From what year to what year approximately?

12 A. From the time I entered the United States Army
13 until the middle '80s.

14 Q. What did you smoke?

15 A. Everything but straw.

16 Q. Is there a particular brand or brands that you
17 chose?

18 A. I was very fickle. I smoked whatever -- mostly
19 whatever I could get free. Cheap.

20 Q. Was there a particular brand, sir?

21 A. Pardon me?

22 Q. Was there a particular brand that you chose over
23 another?

24 A. Not for any continuous period of time, no.

25 Q. Did you only smoke cigarettes?

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1 A. Well, on occasion I smoked a pipe. Someone
2 periodically offered me a cigar. But -- but
3 basically it was cigarettes, yes.

4 Q. How about your colleagues, David and Michael, do
5 they smoke?

6 A. Pardon me?

7 Q. David and Michael, do they smoke?

8 A. No, they are not smokers.

9 Q. Both are nonsmokers?

10 A. Both are nonsmokers.

11 Q. Do you know anything about their history?

12 A. I have no idea whether they had been in the past
13 or not, no.

14 Q. How old is David?

15 A. David? I'd say late twenties, early thirties,
16 maybe.

17 Q. How about Michael?

18 A. Same.

19 Q. Where are they at today?

20 A. They are finishing their dissertations at the
21 University of Minnesota in their respective
22 departments.

23 Q. Will they go on and apply for positions in
24 academia?

25 A. Absolutely, yes.

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1 Q. Some time, then, in the course of your meetings,
2 the three of you began to finalize your report?

3 A. That is correct.

4 Q. And they knew the purpose of the writing?
5 Right? Of your writing?

6 A. Well, explain what you mean by the purpose.

7 Q. They knew that the purpose of the writing was to
8 make this report available in this piece of
9 litigation?

10 A. No.

11 Q. They didn't know that?

12 A. No.

13 Q. You knew that?

14 A. No.

15 Q. What did you know?

16 A. That I was doing historical research, to write
17 this report, and give my best historical view on the
18 basis of the ethics.

19 Q. In fact, when you met with the lawyers here you
20 knew that if you wrote this report that some day you
21 may well be testifying in a court of law?

22 A. That is correct.

23 Q. And that was discussed in general terms when you
24 were in this meeting?

25 A. Yes.

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1 Q. And you knew that part of testifying in a court
2 of law was that you may give a deposition like you're
3 doing here today?

4 A. Yes.

5 Q. And you knew that before you agreed to do the
6 final undertaking, so to speak, with Ellen
7 Fitzgerald?

8 A. Yes.

9 Q. And did you communicate that to David and
10 Michael, what their work was supporting? That was --

11 A. I don't recall communicating that to them, no.

12 Q. You don't know whether they knew that your work
13 was to offer testimony --

14 A. Oh, they knew that, yes.

15 Q. Okay. So they knew that?

16 A. They knew that, yes.

17 Q. And they knew that that testimony was on behalf
18 of the tobacco companies?

19 A. Yes, I think they knew that, as well.

20 Q. Did they have any problems with that? Did they
21 discuss that with you at any time?

22 A. Not -- not at all. They didn't discuss it.

23 They may have had problems with it, but they didn't
24 discuss it with me.

25 Q. The three of you never had that discussion?

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1 A. No.

2 Q. They never discussed their bias one way or the
3 other?

4 A. No.

5 Q. And you didn't discuss yours with them?

6 A. No.

7 Q. And did the three of you co-write this report on
8 the computer? Did you all have it on your screen, so
9 you could call it up and edit it?

10 A. No.

11 Q. You were the only one that had it?

12 A. David and Michael had their version on discs,
13 which we integrated. I added some things, then
14 dictated some things. And the final product was a
15 kind of compilation of all of these things put
16 together.

17 Q. So you still have their discs?

18 A. No.

19 Q. You don't? What did you do with them?

20 A. They were integrated with -- in the final
21 product.

22 Q. What about their disc?

23 A. They -- long erased and over -- used for other
24 purposes.

25 Q. Are you sure of that?

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1 A. Uh-huh.

2 Q. How do you know that? Did you check on it?

3 A. I'm almost certain of that.

4 Q. Why is --

5 A. Because that's our pattern of operation, was
6 that.

7 Q. Did somebody ask you to check on that, to make
8 sure that that was true?

9 A. I certainly can check on that.

10 Q. Did someone ask you to?

11 A. No.

12 Q. Did you give the report to Ellen in draft firm?

13 A. No I did not.

14 Q. Never once?

15 A. No.

16 Q. She couldn't call it up on her computer?

17 A. No.

18 Q. She never saw it in draft?

19 A. No.

20 Q. And you gave her periodic status updates on what
21 you were doing?

22 A. No.

23 Q. How did you know when the report was supposed to
24 be done?

25 A. The attorneys told me.

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1 Q. How did they talk to you?

2 A. Well, meetings, or telephone calls, things like
3 that.

4 Q. I thought you told me there were no meetings
5 with lawyers after the first meeting.

6 A. No.

7 Q. That's what I thought you told me?

8 A. I did not say that. I said there were no
9 meetings after that first one, until I took the
10 assignment.

11 Q. All right. We'll back up.

12 So you have the first meeting, then, with the
13 lawyers here, with the ten to fourteen, or a dozen
14 lawyers. And two weeks later you agree -- one or two
15 weeks you agreed to undertake the assignment. When's
16 the next meeting with lawyers?

17 A. I believe the next meeting -- I -- it's very
18 hard to reconstruct something after two years. Two
19 and a half years. But I believe the next meeting was
20 in December of '95, when I met with -- yes --
21 Mr. Purvis in Washington, D.C.

22 Q. You flew to Washington, D.C.?

23 A. Pardon me?

24 Q. You flew to Washington, D.C.?

25 A. Yes.

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1 Q. So first, in the fall of '95, here you are with
2 ten to fourteen lawyers from Dorsey in this room?

3 A. Not from Dorsey.

4 Q. I -- from around the country?

5 A. Yes.

6 Q. Some from Dorsey and some from other firms.

7 And then in December of '95, three, four months
8 later, you fly to Washington D.C.?

9 A. Uh-huh.

10 Q. You meet with Mr. Purvis?

11 A. Uh-huh.

12 Q. And who else?

13 A. I believe Jan Johnson.

14 Q. And who else?

15 A. That's all.

16 Q. Who's he with?

17 A. Pardon me?

18 Q. Who was he with, do you know?

19 A. Whom?

20 Q. Jan Johnson.

21 A. Jan Johnson? She was with the Dechert, Price,
22 Rhoads firm in Washington, D.C.

23 Q. So you met with the two of them?

24 A. Yes.

25 Q. What did you say during that meeting?

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1 A. What I said was essentially to -- I'd like to
2 get some assistance in doing various kinds of
3 research. And it was at that point that we worked
4 out the way of getting assistance of one kind or
5 another.

6 Q. You mean with your two research assistants?

7 A. That is right.

8 Q. You didn't have that prior to then?

9 A. I believe I had a temporary one, but that person
10 was only temporary.

11 Q. How long did the meeting last in Washington?

12 A. Maybe -- well, it wasn't -- a few hours, I
13 assume, over a period of a day or two. Because I was
14 doing research, as well.

15 Q. What else did you say?

16 A. Pardon me?

17 Q. What else did you say during the meeting?

18 A. That's about all I can recollect.

19 Q. That's all you can remember?

20 A. Yeah.

21 Q. Did you give an update about your research?

22 A. There wasn't very much update to give at that
23 particular moment.

24 Q. Did you know where Mr. Purvis was from?

25 A. Yes.

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1 Q. Where?

2 A. Pardon me?

3 Q. Where?

4 A. Mr. Purvis?

5 Q. Yeah.

6 A. I knew he was with a law firm in Kansas City.

7 Q. You knew that was the Shook, Hardy and Bacon law
8 firm?

9 A. Yes.

10 Q. And did you have some understanding of the
11 relationship of that law firm to the tobacco
12 industry?

13 A. Yes.

14 Q. What was your understanding?

15 A. That it was the law firm that represented one of
16 the tobacco companies. Which one I don't know.

17 Q. Did you understand that they had represented the
18 tobacco industry for a long period of time?

19 A. I did not know that at the time.

20 Q. You've come to know that at a later time?

21 A. Yes.

22 Q. When did you learn that?

23 A. Subsequent to that. I don't recall the exact
24 time.

25 Q. How did you learn that?

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1 A. From my reading.

2 Q. Do you recall what you read?

3 A. I couldn't recall what specifically, but from my
4 reading.

5 Q. Okay. You understood in that second meeting
6 that these lawyers you were meeting with had complete
7 and total access to the tobacco companies' documents
8 if they wanted them?

9 A. I didn't think about that at the time. No.

10 Q. You never thought about it?

11 A. No.

12 Q. Never brought it up with them?

13 A. No.

14 Q. Now, anything else in that meeting, that second
15 meeting, that you can remember?

16 A. Essentially that was what took place.

17 Q. How about the next meeting with lawyers, when is
18 that?

19 A. I may have met with some of the Dorsey Whitney
20 lawyers in subsequent times, but I don't recall
21 specifically.

22 Q. Here in their office?

23 A. Here in their office, yes.

24 Q. So you do recall that you did come here for
25 meetings?

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1 A. Yes. I came here for -- I do recall coming
2 here, yes.

3 Q. Who did you meet with?

4 A. If I'm not mistaken, I believe it was with
5 Michael Lindsay.

6 Q. Who else?

7 A. That's all, that I can think of. I don't
8 believe anybody else. But I could be mistaken.

9 Q. What was the purpose of that meeting?

10 A. Essentially to inform me what the parameters of
11 the court orders on expert witnesses was all about.

12 Q. What was your understanding?

13 A. It was -- I understood that -- that there were
14 certain things I could and couldn't do in terms of
15 revealing certain things, and I understood that there
16 were certain things that I -- at that point I knew
17 that there would have to be a report, somehow or
18 other, written and filed in the future. General
19 questions like that were raised.

20 Q. When's the next meeting?

21 A. I believe the next meeting was, again, with
22 Mr. Purvis. Could have been in the spring or summer
23 of '96. I -- I don't recall the exact time.

24 Q. Where was that meeting?

25 A. That was in Washington, D.C.

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1 Q. Is this now your second trip to Washington?

2 A. That was the second trip to Washington, yes.

3 Q. Who did you meet with?

4 A. Mr. Purvis. Jan Johnson.

5 Q. At Dechert, Price.

6 A. At Dechert, Price.

7 Q. Anyone else?

8 A. Julia Tyler might have been at that meeting or
9 maybe at a subsequent one. I don't recall offhand.

10 Q. Who is Julia Tyler?

11 A. Pardon me?

12 Q. Who was that?

13 A. Julia Tyler was an attorney at Dechert, Price at
14 that time.

15 Q. Okay. What did you say during those meetings?

16 A. It was, again, a meeting to discuss various
17 different -- access to various different research
18 sources and assistance in the research process.

19 Q. What access to what research sources?

20 A. Primarily newspaper files.

21 It was a very difficult and time-consuming task
22 to go through every copy of every newspaper that I
23 wanted. David and Michael couldn't do that by
24 themselves. We needed help.

25 Q. Who helped you with that?

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1 A. A group of -- of researchers in
2 Washington, D.C..

3 Q. Who were they?

4 A. They were researchers who were under my
5 supervision and direction, but hired by the -- at
6 that point I think it was the Dechert firm, to go
7 through the Library of Congress and copy all
8 materials that were -- that were -- all materials,
9 period, in the newspaper files.

10 Q. Well, you've -- all materials pertinent to the
11 question you were researching?

12 A. That's correct.

13 Q. Or all materials?

14 A. All materials pertinent to the question I was
15 researching.

16 Q. As had been defined by you --

17 A. By me.

18 Q. And also had been defined with the assistance of
19 the lawyers?

20 A. No. It was defined by me, period.

21 Q. Were there times when the lawyers met with these
22 research assistants in Washington when you weren't
23 present?

24 A. When I wasn't present?

25 Q. Yes, sir.

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1 A. I couldn't say.

2 Q. You don't know that?

3 A. I don't know that.

4 Q. You didn't demand that with those researchers
5 you would be the only one that would meet with them
6 and control their research, did you?

7 A. Oh yes, I did do that. But then, again, I
8 wasn't in Washington and, therefore, the oversight
9 had to be done by someone there.

10 Q. The oversight?

11 A. That is to say, the -- the pace at which they
12 were working.

13 Q. Okay. How many were there?

14 A. About a half a dozen, I believe.

15 Q. Were they from a university?

16 A. Some were from the University.

17 Q. Where were the others from?

18 A. Some were recent graduates, I believe. And were
19 wives of -- and husbands of people working in
20 Washington.

21 Q. Do you know their names?

22 A. No, I do not.

23 Q. Do you have a list of their names in your
24 office?

25 A. No, I do not.

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1 Q. You can find their names?

2 A. I could call and find their names, but I don't
3 have them offhand.

4 Q. The lawyers know their names?

5 A. Yes.

6 Q. All you have to do is ask Mr. Purvis on a break
7 for their names and he would give them to you; is
8 that right?

9 A. I believe so.

10 Q. All right. What's the next meeting after the
11 second meeting in Washington? Is it back here in
12 Minneapolis with lawyers? I'm talking about meetings
13 with lawyers.

14 A. The next meeting with lawyers could have been
15 last -- late winter or early spring at Chicago,
16 Illinois.

17 Q. Who was at that meeting?

18 A. Oh, some twenty-five -- two dozen lawyers from
19 all over the country.

20 Q. Where was that meeting at?

21 A. That was -- meeting was held in the Chicago
22 offices of Jones, Day.

23 Q. And two dozen lawyers in a room?

24 A. Yes.

25 Q. And you?

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1 A. I was there for twenty minutes with them.

2 Q. Who else was there?

3 A. Who else?

4 Q. In the meeting when you were there for twenty
5 minutes, who else was there besides two dozen lawyers
6 and you?

7 A. That's it.

8 Q. That's it?

9 A. There may have been a secretary there. I don't
10 know. I couldn't identify them.

11 Q. What did you say during that meeting?

12 A. I gave a twenty-minute summary of my research
13 findings to date.

14 Q. Did you do that from notes?

15 A. Pardon me?

16 Q. Did you do that from notes?

17 A. No. From mind.

18 Q. Totally from your head?

19 A. Yes.

20 Q. You had nothing in your briefcase when you met
21 with the lawyers, is that right?

22 A. I'm sorry?

23 Q. Is it correct that you had nothing in your
24 briefcase when you flew to Chicago to meet with
25 twenty-four lawyers? That you had nothing in your

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1 briefcase related to what you were going to talk
2 about?

3 A. That is correct.

4 Q. That you flew down there, read the paper, went
5 into this meeting -- you didn't have a briefcase? Or
6 do you normally carry one?

7 A. As a matter of fact, I don't think I had a
8 briefcase with me. I had a -- I had something, but
9 I'm sure it wasn't a briefcase.

10 Q. So you walked into the meeting and gave an
11 update about what you'd been doing?

12 A. That is correct.

13 Q. What did you say?

14 A. What I said -- essentially said was that my
15 research leads me to the conclusion that the health
16 hazards of smoking have been well known by Americans
17 and Minnesotans since the beginning of time.

18 Q. And you were not restricting your opinions to
19 Minnesotans; you were also restricting it -- I mean
20 you were also giving opinions about America?

21 A. That's correct.

22 Q. And Americans?

23 A. That's correct.

24 Q. So you were sharing that thought about all
25 Americans, as well as Minnesotans?

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1 A. I was not limiting it to Minnesota, that is
2 correct.

3 Q. And your view is that the health hazards were
4 well known by all Americans, as well as by
5 Minnesotans?

6 A. That's correct.

7 Q. Now, again, before that meeting you hadn't
8 interviewed one American in person?

9 A. No.

10 Q. And you hadn't interviewed one Minnesotan?

11 A. No.

12 Q. And you had not interviewed one person from the
13 tobacco industry?

14 A. That's correct.

15 Q. Or read one tobacco document?

16 A. That's correct.

17 Q. And you didn't ask anybody, even though there
18 were twenty-four lawyers in that room, representing
19 the tobacco industry, you didn't ask for one
20 document?

21 A. No.

22 Q. And you didn't ask for one interview?

23 A. No.

24 Q. And to your knowledge they were all lawyers in
25 the room?

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1 A. To my knowledge they were all lawyers, yes.

2 Q. What else did you say?

3 A. I spoke, I think, a little bit about the long
4 and involved history of the state's actions in regard
5 to the health hazards of smoking.

6 Q. What did you say there?

7 A. That the state, from the 1860s on, was in fact a
8 leader in efforts at limiting, restricting,
9 containing, the smoking hazards.

10 Q. That Minnesota was?

11 A. Minnesota was, yes.

12 Q. Did they tell you they knew that?

13 A. No.

14 Q. Did you think that the tobacco companies knew
15 that?

16 A. I had no idea what they knew.

17 Q. You had no idea whether the tobacco companies
18 knew that Minnesota was a leader?

19 A. That was not my concern, what they knew. My
20 concern was these are the questions.

21 MR. PURVIS: When you get to a point, where we
22 can take a break --

23 MR. MANNING: Any time you'd like.

24 (Discussion had off the record.)

25 (Recess taken.)

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1 BY MR. MANNING:

2 Q. After the meeting in Chicago, what's the next
3 meeting you had with lawyers?

4 A. After that meeting in Chicago I think the next
5 meeting I had with lawyers was in -- while we were
6 preparing this report, yes. That would be -- that
7 would be in May, June, of this year.

8 Q. While who was preparing this report?

9 A. While I was preparing the report. I and my
10 research assistants.

11 Q. Who did you meet with?

12 A. With Liza Kessler of the law firm of Jones,
13 Day. And John Monica, Junior.

14 Q. And who?

15 A. John Monica, Junior.

16 Q. Where were those meetings?

17 A. Here at Dorsey and Whitney. And at Gray, Plant
18 & Mooty.

19 Q. All here in Minneapolis?

20 A. Yes.

21 Q. How many meetings did you have about the report?

22 A. Two or three.

23 Q. And they were meetings specifically to discuss
24 what you were putting in the report?

25 A. No.

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1 Q. What were the meetings for?

2 A. The meeting was specifically to discuss what in
3 fact the court wanted in the report.

4 Q. And do you recall what you said in the first
5 meeting with Liza Kessler and John Monica?

6 A. Yes.

7 Q. What?

8 A. I asked questions regarding what are the
9 parameters of the report, as the Court wanted them.

10 Q. What else did you say?

11 A. Listened. And got a copy, finally, of the
12 Court Order on the report, so I had it in front of
13 me.

14 Q. So you had a copy of the Court Order?

15 A. Court Order, yes.

16 Q. Was that a Court Order of March 13th of 1997, do
17 you know?

18 A. I have no idea what that is.

19 Q. You don't recall the date?

20 A. No. Not dates.

21 Q. Do you recall that the order required that all
22 experts, including you, provide with their report all
23 notes, handwritings, calculations, or other documents
24 of any kind at the time of service of the report that
25 were prepared or on hold for this matter by the

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1 expert or by others? That would be produced?

2 A. Uh-huh.

3 Q. Do you recall that?

4 A. Yes, I do.

5 Q. And you know that by this report alone you
6 haven't done that? The only way you could do that is
7 if we had the six drawers in your office; correct?

8 MR. PURVIS: Object to the form of the
9 question.

10 BY MR. MANNING:

11 Q. Correct, sir?

12 A. Sorry?

13 I have no idea. Because I don't work that way.

14 Q. No, no. Listen to the question.

15 The order said, what you read, --

16 A. Yes.

17 Q. You acknowledge that you are familiar with the
18 language from the order from which I am quoting?

19 A. I certainly am.

20 Q. That the order requires you to produce all
21 notes, handwritings, calculations, or any documents
22 of any kind or nature prepared in whole or in part
23 for this matter by the experts?

24 MR. PURVIS: Object to the form of the
25 question.

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1 MR. MANNING: Can I finish my question,
2 counselor?

3 THE WITNESS: Uh-huh.

4 BY MR. MANNING:

5 Q. You understand that that was language in the
6 Court Order?

7 A. So I understand, yes.

8 Q. And you understand that by producing only this
9 report, without the documents that are in the six
10 file drawers in your office, you're not in compliance
11 with that Court Order? You understand that?

12 MR. PURVIS: Object to the form of the
13 question.

14 BY MR. MANNING:

15 Q. Correct?

16 A. I don't know what you're talking about.

17 Q. Now, -- why don't you know what I'm talking
18 about?

19 MR. PURVIS: Object to the form of the
20 question.

21 BY MR. MANNING:

22 Q. You understood all the questions?

23 A. Yeah.

24 Q. You told me that.

25 A. I don't understand what you mean by the six file

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1 drawers.

2 Q. They are -- all the documents that you relied
3 on, to formulate this report, are in those six
4 drawers; correct?

5 MR. PURVIS: Object to the form of the
6 question.

7 BY MR. MANNING:

8 Q. Correct?

9 A. I relied on that and others.

10 Q. And others. And in those six file drawers are
11 specifically the documents that are underlined and
12 highlighted by your research assistants, that you
13 read only the underlining and highlighting of,
14 without reading the entire documents sometimes;
15 that's in those six drawers, correct? That's what
16 you told me.

17 A. Maybe, but mostly not.

18 Q. But that's what you told me?

19 A. No.

20 Q. They may be there?

21 A. Right.

22 Q. They may also be in their drawers? In their
23 files?

24 A. Unlikely.

25 Q. But it's possible?

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1 A. It's possible.

2 Q. You haven't checked?

3 A. No, I haven't checked.

4 Q. You haven't asked them recently, that question
5 specifically, have you?

6 A. I assumed everything they had, they gave me.

7 Q. Okay. So you assumed that what they had by way
8 of underlining and highlighting, that they gave you,
9 that you read, that in some way, shape, or form,
10 found its way into this report is in your six file
11 drawers?

12 A. I assume, yes.

13 Q. And you understand that those haven't been given
14 to me?

15 A. No, I have not emptied my file drawers for you,
16 no.

17 Q. All right. Now, after these two meetings with
18 these lawyers here at Gray Plant and Dorsey, what
19 were the next meetings you had with lawyers?

20 A. The next meetings were meetings with lawyers
21 in preparation for this deposition.

22 Q. Who was in that meeting?

23 A. Liza Kessler. John Monica. And Julia Tyler.

24 Q. Who else?

25 A. That's -- I think Allen Purvis was in -- at that

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1 meeting, as well.

2 Q. Who else?

3 A. That's it. As far as I can recall.

4 Q. How many meetings did you have to prepare for
5 this deposition?

6 A. Three. Four.

7 Q. When was the first one?

8 A. Pardon me?

9 Q. When was the first one?

10 A. When was the first one? Sometime in late July,
11 early August.

12 Q. How long did it last?

13 A. Maybe one or two hours.

14 Q. What was discussed?

15 MR. PURVIS: Object to the form of the
16 question. I'll ask Professor Berman not to reveal
17 the contents of the conversations with counsel, as
18 they are privileged.

19 MR. MANNING: Are you claiming attorney-client
20 privilege on those conversations, counsel? So I
21 understand the nature of your objection.

22 MR. PURVIS: Yes.

23 MR. MANNING: Is that right?

24 MR. PURVIS: Work-product privilege.

25 MR. MANNING: You are claiming attorney-client

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1 privilege, as well; is that right?

2 MR. PURVIS: I'm claiming work-product

3 privilege.

4 BY MR. MANNING:

5 Q. What did you say in those meetings?

6 A. "I understand."

7 Q. You listened?

8 A. I listened.

9 Q. Was a general overview of the litigation
10 provided to you?

11 A. Never. No.

12 Q. Was a general overview of what other experts
13 were going to testify to in this case ever provided
14 to you?

15 A. No.

16 Q. Never?

17 A. Never.

18 Q. Was -- but you listened for two to three hours;
19 is that right?

20 A. That is correct.

21 Q. And you said you understood?

22 A. Yes.

23 Q. And then you had another meeting?

24 A. Yes.

25 Q. And how long did that last?

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1 A. Roughly the same amount of time. Maybe a little
2 longer.

3 Q. Go the same way? You listened for three hours
4 and said you understood?

5 A. Roughly that, yes.

6 Q. What else did you say besides "I understand" in
7 that meeting?

8 A. That's about it, I think.

9 Q. And another meeting?

10 A. A third, yes.

11 Q. Yesterday?

12 A. No.

13 Q. When was that?

14 A. Two weeks ago approximately.

15 Q. How long did that last?

16 A. Oh, about four hours. Five hours. Something
17 like that.

18 Q. Did you provide an overview of your opinion?

19 A. Yes.

20 Q. You did?

21 A. They had it already.

22 Q. They had the written opinion?

23 A. Yes.

24 Q. Did you provide a verbal overview of it?

25 A. No. No.

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1 Q. Did you say anything in that meeting again
2 besides "I understand" for four hours?

3 A. I said many things. But I don't recall what the
4 specifics were.

5 Q. What did you say?

6 A. I understand what the ground rules of the
7 deposition are. I understand what the purpose of the
8 deposition is. And although I have been deposed -- a
9 deposed witness in other cases, it never has been
10 with this kind of intensity and, therefore, I'll be
11 prepared for it.

12 Q. You want to be prepared for it?

13 A. I'll be prepared for it, yes. That's what I
14 said, yes.

15 Q. What did you mean by that? What were you going
16 to do to get prepared for it?

17 A. Very simply, it -- I'm not a lawyer, but I
18 understand that the adversarial relationship is in
19 fact central to the legal operation. And in my
20 previous depositions we had no adversarial
21 relationship.

22 Q. You understand that when people are in the
23 legislative arena that a good deal of your opinion is
24 based on legislative history; correct?

25 A. Yes.

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1 Q. Both national, as well as Minnesota?

2 A. That is correct.

3 Q. And you understand -- you think you understand

4 the legislative process pretty well; right?

5 A. Pretty well.

6 Q. Yes.

7 And you surely understand that lobbying is a

8 part of the legislative process?

9 A. Yes.

10 Q. And you understand that industries that have

11 finances and money, such as the tobacco industry, has

12 a lobbying effort, both nationally and locally?

13 A. Of course.

14 Q. And you also understand that when people lobby

15 on a legislative level, when they do it by industry,

16 that sometimes they have associations with other

17 industries--they form groups, larger groups; correct?

18 A. Yes.

19 Q. And you understand that when you're looking at a

20 bill, or a piece of legislation, a draft of a bill,

21 or if you're looking at a bill that's been defeated,

22 or a bill that's been passed, that there may be two

23 sides to that bill?

24 A. Sure.

25 Q. And --

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1 A. Maybe even more than two sides.

2 Q. May have been more than two sides. In fact, may
3 have been collective interests with the tobacco
4 industry against a bill?

5 A. That's correct.

6 Q. There may have been collective interests with
7 the tobacco industry for a bill?

8 A. Yes.

9 Q. In fact, the tobacco industry may have gone out
10 and garnered the collective interests; you understand
11 that?

12 A. Could be.

13 Q. And you understood that every time you looked at
14 a bill in the legislative process?

15 A. Correct.

16 Q. Correct?

17 A. Well, obviously it was part of general
18 knowledge, yes.

19 Q. And yet you not once asked for one document that
20 would reveal the lobbying effort on behalf of the
21 tobacco industry or the tobacco companies that may
22 have impacted that process, did you, sir?

23 A. That is correct.

24 Q. And you never thought about doing it, did you?

25 A. Oh, I thought about doing it, but I never did

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1 it.

2 Q. Okay. And no one ever offered those documents
3 to you, did they?

4 A. It's hard to say whether they offered it or not.

5 Q. You don't remember, sitting here today, somebody
6 saying to you, "Professor Berman, read these
7 documents. These are the lobbying documents on
8 behalf of the tobacco company. You ought to read
9 these in order to give an unbiased, objective,
10 academically-free opinion"; you don't recall that, do
11 you?

12 A. Nope.

13 Q. If we can turn to your report, sir.

14 A. Surely.

15 Q. It's been marked as exhibit what?

16 A. Pardon me?

17 Q. It's been marked as exhibit what?

18 A. 3135.

19 Q. Uh-huh.

20 A. I think that's what that number down below
21 means.

22 Q. Thank you.

23 You've reviewed this thoroughly, right?

24 A. Yes.

25 Q. Many times?

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1 A. Pardon me?

2 Q. Many times you've reviewed this report?

3 A. I wouldn't say many times, but often, yes.

4 Q. Yeah.

5 And on the second page -- you are a historian?

6 A. Uh-huh.

7 Q. Correct?

8 A. That is correct.

9 Q. That is your training?

10 A. That is my training, yes.

11 Q. That is your experience?

12 A. That is my experience.

13 Q. That's your area of reading?

14 A. That is correct.

15 Q. And you're not a psychologist?

16 A. Not at all.

17 Q. You're not a behaviorist?

18 A. No.

19 Q. Page three of your report, your introduction.

20 A. Uh-huh.

21 Q. You said that you will testify, sir, regarding
22 the history and evolution of cigarette smoking in
23 twentieth-century America; correct?

24 A. Correct.

25 Q. And you intend to do that?

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1 A. If asked, yes.

2 Q. And part of your opinion touches on the history
3 and evolution of cigarette smoking in
4 twentieth-century America?

5 A. Correct.

6 Q. And yet, when you want to understand the history
7 and the evolution of smoking in twentieth-century
8 America, you've not asked the tobacco companies for
9 their historical analysis or their historical
10 documents, have you?

11 A. No, I have not.

12 Q. And you have not asked the tobacco industry for
13 its documents that reflect the evolution of cigarette
14 smoking in twentieth-century America and how they
15 have impacted -- specifically how they have impacted
16 the evolution of cigarette smoking in America; you've
17 not done that, have you?

18 A. No, I have not.

19 Q. Now, it's the first sentence in your summary.

20 Let's go to the second. You say that you
21 anticipate testifying about the various social,
22 cultural, and technological developments that have
23 affected cigarette consumption; correct?

24 A. Uh-huh.

25 Q. What are the technological developments that

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1 affected cigarette consumption, to your knowledge?

2 A. The most important one was the development of
3 the cigarette-making machine in -- if -- I believe it
4 was 1887, 1888.

5 Q. So the technological developments --

6 A. In terms of the industry.

7 Q. Yeah.

8 The technological developments that you think
9 are the most important for the industry are the
10 invention of the cigarette-making machine in 1887;
11 right?

12 A. Approximately 1887.

13 Q. Anything else?

14 A. Yes.

15 The most important technological development
16 that led to the widespread use of cigarettes was, in
17 fact, the industrial revolution.

18 Q. I'm talking about the technological developments
19 that have affected cigarette consumption.

20 A. Yes.

21 Q. You're saying that one of those was the
22 industrial revolution?

23 A. Industrial Revolution. Yes.

24 Q. All right. Great.

25 What else?

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1 A. Uh-huh.

2 Q. Pardon me?

3 A. Well, the industrial revolution subsumes within
4 it many other things. If you want me to give a --

5 Q. I think I understand the industrial revolution
6 pretty well.

7 I'm talking about the technological developments
8 that have affected cigarette consumption.

9 A. Yes. And I'm talking about technological
10 revolution of the industrial revolution and how it
11 affected changes in the patterns of behavior and the
12 patterns of migration, et cetera, that in fact
13 affected cigarette consumption.

14 Q. Okay. Thank you.

15 Anything else? What other technological
16 developments besides this machine and the industrial
17 revolution that --

18 A. That's about -- that's what was in fact -- in --
19 that was the thought behind that phrase.

20 Q. Okay. So that's what you meant by technological
21 development that have affected cigarette consumption?

22 A. Correct.

23 Q. Now you would agree that the manufacturer of a
24 product, in general, knows the most about the
25 technological development of its product?

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1 A. Yes.

2 Q. Correct?

3 A. Of course.

4 Q. Sure. Because they made it?

5 A. Yeah.

6 Q. Right.

7 A. Of course.

8 Q. So if you wanted to know the details of the
9 technological development of the cigarette, you would
10 know, by what you just said, that the people with the
11 most knowledge about that would be the cigarette
12 companies because they make it?

13 A. Certainly.

14 Q. Absolutely. Correct?

15 A. Sure. Absolutely, yes.

16 Q. So here you are, in the second sentence of your
17 introduction, giving an opinion, as you have just
18 done, on the technological developments that have
19 affected the cigarette consumption, and you have not
20 gone to the cigarette industry or one tobacco company
21 and asked them for documents that reflect the
22 historical technological developments of a cigarette?

23 A. No, I have not.

24 Q. And because you haven't, and because you have
25 just admitted that the people with the most knowledge

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1 on that topic would in fact be the tobacco companies,
2 then you would agree that at minimum your opinion on
3 the technological development of the cigarette
4 industry is not objective at all?

5 A. I would not agree with that at all.

6 Q. You would agree, then, would you not, sir, that
7 at a minimum it does not take into account the
8 documents and the thoughts of the people or the
9 groups of people who have the most knowledge about
10 it?

11 A. I would not agree with that either.

12 Q. You go on to say that you will also testify that
13 tobacco and cigarettes have always been the subject
14 of controversy; right?

15 A. That is correct.

16 Q. And that such opposition included claims that
17 cigarette smoking can be dangerous to health, fatal,
18 addictive, and/or habit-forming; right?

19 A. That is correct.

20 Q. Now in your research you found that in the
21 general public, so to speak, there was lots of
22 statements that cigarette smoking were addictive?

23 A. Uh-huh.

24 Q. Correct?

25 A. Yes.

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1 Q. And you agree with that?

2 A. Yes.

3 Q. And you know that?

4 A. Depending on the definition of addiction in
5 different times, yes.

6 Q. Correct?

7 A. Yes.

8 Q. And you knew that from your own personal
9 experience, --

10 A. Of course.

11 Q. -- that there was an addictive element to
12 smoking?

13 A. Of course.

14 Q. Sure.

15 And you, absolutely believe that the tobacco
16 companies know that cigarette smoking is addictive;
17 correct?

18 A. I don't know whether they -- what they know.

19 And that's not my concern.

20 Q. Oh but, sir, if the people of America -- and
21 you're saying that the people of America know it's
22 addictive, right?

23 A. Yes.

24 Q. And you're also saying the people of Minnesota
25 know it's addictive, right?

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1 A. Uh-huh.

2 Q. Correct?

3 A. Yep.

4 Q. We've also already agreed that a manufacturer is
5 the one who knows the most about his product; right?

6 A. Yes.

7 Q. And they would know the most about the qualities
8 of their product?

9 A. Sure. Yes.

10 Q. And if America knows, and the people of
11 Minnesota know, then don't you know that the tobacco
12 companies also know that their product is addictive?

13 A. No.

14 Q. You don't know that?

15 A. I don't know that. As a historian I don't know
16 that because I haven't looked at the documents, and
17 it was not my concern to look at those documents.

18 Q. It was not any element of your concern? You
19 were only going to pontificate about America and
20 Minnesota, but you weren't going to look at the
21 tobacco companies and whether they knew, is that
22 right?

23 MR. PURVIS: Object to the form of the question.

24 BY MR. MANNING:

25 Q. I'm sorry. Render an opinion.

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1 A. Sir, if you use terms like pontificate, I will
2 have to object myself.

3 Q. No problem. I'll withdraw the question.

4 If a word I use, like that, offends you, I will
5 apologize and withdraw the question. Okay. Because
6 it's not meant to.

7 A. I've taught for thirty-seven years at the
8 University of Minnesota and never was challenged on
9 pontification.

10 Q. Sir, it's a word that I use as a form of
11 rendering an opinion. And I've just said I withdraw
12 the word. And it may occur again, --

13 A. I resent that word.

14 Q. That's fine. I understand.

15 A. I resent it very much.

16 Q. I told you I withdraw it and I apologize. If it
17 occurs again in the next ten hours, which I suspect
18 it may, in the form of answering questions and asking
19 questions, please say so.

20 Okay?

21 A. Uh-huh.

22 Q. Because it is not my intention.

23 It is my intention to ask you questions, as you
24 know.

25 A. Surely. By all means.

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1 Q. All right. So it just wasn't part of your
2 interest to determine whether tobacco companies knew
3 that cigarette smoking was addictive, or wasn't part
4 of your interest?

5 A. Not at all. Not in this particular project, no.

6 Q. But as a matter of common sense, if you have
7 concluded that America knew cigarette smoking was
8 addictive, and the people of Minnesota knew that
9 cigarette smoking was addictive -- we'll come back to
10 how you knew that and why what it's based on and on
11 and on -- but if you did conclude that, then you
12 would also, at a minimum, conclude that tobacco
13 companies, who are also Americans, and made up of
14 Americans, also knew that their product was
15 addictive?

16 MR. PURVIS: Object to the form of the
17 question.

18 BY MR. MANNING:

19 Q. Correct? It's common sense; correct?

20 A. I'm here as a historian, not as a common sense
21 person. And, therefore, I have no knowledge what the
22 tobacco company knew and I have no intention of
23 discovering that because that was not part of my
24 research scheme.

25 Q. Did you have an intention of not discovering

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1 that?

2 A. I have no interest in discovering that.

3 Q. No interest in discovering that. Why, if in

4 fact --

5 A. I have an interest in discovering that only
6 outside of the purview of this particular thing, but
7 not in terms of being a historian, no.

8 Q. Why do you have interest in discovering --

9 A. As a citizen. In general.

10 Q. Because, in fact, if they knew it was addictive,
11 and said that it wasn't, that would be a lie,
12 wouldn't it?

13 A. I don't know what they said.

14 Q. Pardon me?

15 A. I don't know what -- you know, what that would
16 be. That's a hypothetical question and not based on
17 any kind of evidentiary material that I had before
18 me.

19 Q. But I can ask you hypothetical questions.

20 Okay. And you need to answer them.

21 So, in fact, if the tobacco companies, as
22 Americans, knew, like other Americans, that cigarette
23 smoking was addictive, and they said to the American
24 people the opposite, that it wasn't, that would be a
25 lie, would it not?

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1 A. Well, hypothetical question -- I would generally
2 in my classes answer hypothetical questions by asking
3 a hypothetical question. And my question is: If my
4 grandfather were my grandmother would I be me?

5 Q. Let me explain, okay? This is not class.
6 You've stepped out of class.

7 A. Okay.

8 Q. And you're testifying.

9 A. Uh-huh.

10 Q. And you know that?

11 A. Yes.

12 Q. That's why you met three times just to get
13 prepared for this deposition.

14 A. Exactly.

15 Q. So I'll ask the hypotheticals, just by way of
16 ground rules.

17 A. But I cannot answer them as a historian.

18 Q. Just answer them as a witness, as a person, and
19 as a human being; okay?

20 A. Okay.

21 Q. If you want to put one hat on, and another hat
22 on, you do whatever you want to do.

23 A. Okay.

24 Q. Now, do you want the question again, or do you
25 have it in mind?

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1 A. No. Please ask the question again, so I know
2 exactly what I'm answering.

3 Q. If in fact tobacco companies, as Americans, made
4 up of Americans, like their fellow Americans, knew,
5 as you say, that tobacco in cigarettes was addictive,
6 and they said the opposite, that it wasn't addictive,
7 then it's a lie; correct?

8 A. As a historian I have no opinion on that. As an
9 individual, yes, it would be.

10 Q. Thank you.

11 You then go on in the second paragraph of your
12 introduction, "I intend to testify regarding the
13 longstanding and widespread awareness of the American
14 public, including the awareness of the citizens of
15 Minnesota"; do you see that?

16 A. Uh-huh.

17 Q. How can you testify, sir, about the awareness of
18 another human being without talking to them?

19 A. We do not do survey research with historical
20 materials.

21 Q. I understand that.

22 A. Uh-huh.

23 Q. That's my point.

24 A. Okay. There are various ways of determining
25 what, in fact, public knowledge -- or the extent of

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1 public knowledge is without interviewing people.
2 Q. And without interviewing people, if you're going
3 to determine the extent of historical knowledge,
4 without interviewing people, and without talking to
5 them, it underscores the importance of the objective
6 nature of your research, doesn't it?

7 A. May I ask you a question?

8 Q. No, sir. You may not.

9 A. I'm answering your question. May I ask you a
10 question?

11 Q. No, sir. Just listen to the question and if you
12 can answer it, answer it. If you can't answer it,
13 then tell me why, if you can't answer it?

14 A. Repeat the question, please.

15 Q. Yes, sir.

16 MR. MANNING: Please, Janet.

17 (Record read.)

18 THE WITNESS: No, it does not.

19 BY MR. MANNING:

20 Q. Why not?

21 A. Because interviewing an individual does not give
22 me insight into the entire parameter of public view.

23 Q. Are you, in your view, able to make a statement
24 about the awareness of the people of the state of
25 Minnesota at any point in time?

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1 A. Yes.

2 Q. So in your view you can make a statement about
3 the awareness of people of the state of Minnesota in
4 1900?

5 A. 1900?

6 Q. Yes, sir.

7 A. Yes.

8 Q. You think you can make a statement about the
9 awareness of people in the year zero?

10 A. In the year zero there wasn't tobacco.

11 Q. No, no, I'm not asking that.

12 As a historian can you make a statement about
13 the awareness of people in the year one hundred?

14 A. I have no knowledge of that. No, I have not
15 done research on that.

16 Q. In any other type of historical analysis.

17 How far back have you ever gone as a historian
18 making statements about awareness? How far back in
19 history have you gone?

20 A. In my teaching at the University of Minnesota
21 I've taught American History from the colonial period
22 to the present.

23 Q. Uh-huh.

24 A. I've read extensively in that area. I've
25 lectured in that area. In terms of time, it goes

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1 back that far. In graduate school I did my minor in
2 Jewish history, which went back to biblical times.
3 And I have on occasion done some work in that and
4 lectured in that.

5 So in terms of time, I couldn't give you the
6 exact time where I could go back to. But in terms of
7 U.S. History, yes.

8 Q. In order to -- I'm not talking to you about
9 history, okay?

10 A. Uh-huh.

11 Q. I want to be clear about that.

12 I'm talking to you about awareness. All right?

13 A. Awareness of what?

14 Q. Just -- preliminary statement.

15 A. I'm sorry, I can't ask you a question. I'm
16 sorry.

17 Q. That's all right. Preliminary statement. I'm
18 talking about awareness.

19 How can you, sir, make a statement about who was
20 aware of what in 1900?

21 A. On the basis of a preponderance of evidence of
22 what in fact the people had before them.

23 Q. Now, --

24 A. On any particular subject, of course.

25 Q. On a particular subject?

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1 A. On a particular subject, obviously.

2 Q. And why do you pick the words preponderance of
3 evidence? How do you pick based on preponderance of
4 evidence?

5 A. Well, the words preponderance of evidence means
6 the accumulation of materials having to do with a
7 particular subject.

8 Q. Uh-huh.

9 A. And what these materials, in fact, were
10 attempting to do.

11 Q. And so what you do is you go back and you look
12 at those materials --

13 A. Yes.

14 Q. -- that were around in 1900?

15 A. Yes.

16 Q. And -- but now you have to, in looking at those
17 materials, you have to now make a leap from those
18 materials into people's minds as to what and how they
19 were aware; correct?

20 A. Not really.

21 Q. For example, sir, you have no idea if the
22 Women's Temperance League was stating something one
23 way, what level of awareness it created, do you?
24 Because you have not done any work to survey the
25 people of Minnesota at that particular time when the

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1 Women's Temperance League was speaking, as to what
2 their reaction was to the Women's Temperance League?

3 A. No, I didn't survey the people of Minnesota at
4 that time.

5 Q. So you don't know whether the people of
6 Minnesota at that point in time, whether 98% of the
7 people, thought the Women's Temperance League was
8 nuts and didn't take their opinion into account, or
9 whether 98% of the people agreed with the Women's

10 Temperance League? You just have no idea, correct?

11 You have no idea?

12 A. Not really, but...

13 Q. You just know that the Women's Temperance League
14 was speaking on the topic?

15 A. And what -- and what degree of support they
16 generated within the state, yes. In other words,
17 through what support base they had in the state, or
18 in the nation, for that matter.

19 Q. The support base they had doesn't, per se,
20 correlate to what the population was aware of,
21 vis-a-vis what they were saying, does it?

22 A. No.

23 Q. You're not making that leap are you?

24 A. No, no, no.

25 Q. No?

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1 So, in fact, you cannot make a conclusion, as we
2 sit here, taking one source that you picked, the
3 Women's Temperance League, --

4 A. Not one source alone.

5 Q. You cannot make a conclusion from that source
6 what degree of awareness, based on the position that
7 they took on cigarette smoking publicly, what it
8 correlates to in people's minds in Minnesota, can
9 you?

10 A. Not on the basis of that one piece of evidence.

11 Q. No. I understand.

12 What do you mean when you say Minnesota's
13 knowledge? If you want the context it's on page
14 four.

15 A. I'm sorry, which context?

16 Q. Page four, first sentence, first full
17 paragraph. "I also anticipate testifying regarding
18 Minnesota's knowledge" --

19 A. Where's that? I'm sorry. Oh, I see.

20 Q. -- "...of the health risks associated with
21 cigarettes and their addictive or habituating nature,
22 as those terms have been used for decades in popular
23 culture."

24 A. I think that's a typo. It's -- regarding
25 Minnesotans'.

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1 Q. Minnesotans'?

2 A. Yes. That is a typo.

3 Q. Okay. Thank you.

4 A. Uh-huh.

5 Q. How -- who are the Minnesotans that you are
6 talking about? Who are they?

7 A. Depending on any particular moment, it's of
8 course the kind of general view held by the populous
9 in the State of Minnesota.

10 Q. Thank you.

11 So through no survey work?

12 A. Pardon me?

13 Q. You've done no survey work?

14 A. No.

15 Q. You understand what surveys are?

16 A. Oh, I certainly have.

17 Q. Ever been involved in them?

18 A. I've used them quite extensively, yes.

19 Q. Professionally?

20 A. Professionally.

21 Q. How have you used them?

22 A. I've used them to check various different
23 questions in terms of public awareness of various
24 different issues. Used the Gallup poll, the
25 Minnesota poll, the Roper poll. I've used them in

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1 conjunction with the -- with the -- some -- one bad
2 career move I made, when I was in the governor's
3 office.

4 Q. What -- what was that?

5 A. Oh, we had Peter Hart doing the polling for the
6 governor and, you know, I didn't oversee that, but I
7 was involved in it to some extent.

8 Q. What was the bad move that was made? Tell me
9 that.

10 A. Oh, I was just joking, just being in the
11 governor's office.

12 Q. Oh.

13 What governor were you with?

14 A. Rudy Perpich.

15 It was a bad joke.

16 Q. That's no problem, I understand. It's not a
17 biggy.

18 You worked for Rudy, though?

19 A. No, I did not work for Rudy.

20 Q. You consulted for him?

21 A. Yes.

22 Q. And Peter Hart was a pollster?

23 A. That's correct.

24 Q. And you understand that you can sit around in a
25 room, for example, with Rudy Perpich and you can

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1 think that the people of Minnesota view something a
2 certain way? Politicians do that, right?

3 A. Well, the basis of their -- of the kind of
4 actions they take, yes.

5 Q. And sometimes they say, well, I -- the
6 Minnesotans view it this way, but in fact when they
7 do a poll or a survey they find out they were wrong?

8 A. That's correct.

9 Q. And it's the poll or the survey that has some
10 scientific and statistical analysis behind it;
11 correct?

12 A. Right.

13 Q. And it is through that scientific and
14 statistical analysis that one can confirm whether a
15 gut impression is accurate; right?

16 A. Uh-huh.

17 Q. And frequently gut impressions are wrong;
18 correct?

19 A. Sometimes, yes.

20 Q. Yeah. And you've been a part of that
21 statistical analysis?

22 A. Yes.

23 Q. You're not the one that does it because you're a
24 historian?

25 A. That's correct.

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1 Q. But you've seen other professionals do that?

2 A. Yes.

3 Q. And there's not been one ounce of statistical
4 analysis or survey work done as a part of your
5 report, has there?

6 A. That is correct.

7 Q. And if the tobacco companies did statistical
8 research about people's awareness on certain issues,
9 do you expect that they would have shown it to you?

10 A. I have no idea.

11 Q. Well, when you went to the meeting of
12 twenty-four lawyers in a big -- I take it was a big
13 conference room at Jones, Day in Chicago; right?

14 A. Uh-huh.

15 Q. And there were twenty-four lawyers representing
16 the entire tobacco industry, as you understood it;
17 right?

18 A. Yes.

19 Q. And you were giving them a summary of your view
20 and opinions; right?

21 A. Yes.

22 Q. And you were talking to them about the awareness
23 of the American people in Minnesota specifically,
24 right?

25 A. Yes.

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1 Q. And if they had within their knowledge and
2 possession at that time statistically accurate
3 information about Americans and Minnesotans, but
4 particularly Americans, levels of awareness about
5 certain issues related to cigarettes, don't you think
6 they should have given it to you?

7 A. That's, again, a hypothetical question. I have
8 no idea whether they had such information.

9 Q. I said if they did. You can assume, for
10 purposes of this.

11 If they did, --

12 A. Uh-huh.

13 Q. If they did, you as a professional, would you
14 expect that they would give it to you?

15 A. If it had a bearing on what I was doing, yes.

16 Q. Right. Because if it did, you might sort of
17 look dumb later on? You might be duped if they had
18 certain information that they haven't given to you,
19 and then it's shown to you later on and then you say
20 "Why didn't they show it to me"; right?

21 A. Yeah.

22 Q. Yeah. You go on to say here, sir, in the second
23 paragraph on page four, going down about seven lines,
24 you say, "Moreover, the state has received
25 significant economic benefit over the years from the

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1 sales of tobacco, including substantial revenues..."

2 da-da-da-da; correct?

3 A. Yes.

4 Q. You have not looked at the cost --

5 A. At costs?

6 Q. Let me finish the question, sir.

7 A. Sorry.

8 Q. I'm sorry.

9 A. I didn't hear what you said.

10 Q. That's all right. I didn't finish the question,
11 but I paused, and it's my fault, not yours.

12 You have not looked at the cost to the state of
13 Minnesota as a result of the consumption of
14 cigarettes in this state, have you?

15 A. No, I have not.

16 Q. You've not looked at one piece of data, have
17 you?

18 A. On that issue?

19 Q. Yes.

20 A. No.

21 Q. You've not asked to see one piece of data on
22 that issue, have you?

23 A. No.

24 Q. Even though you saw that that issue was talked
25 about at great length in the complaint that was given

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1 to you; correct?

2 A. That is correct.

3 Q. But that you didn't ask for any information on?

4 A. No.

5 Q. Now, you did review the amended complaint?

6 A. The amended complaint? I don't know what that
7 is.

8 Q. You reviewed a complaint?

9 A. I reviewed a complaint, yes.

10 Q. You didn't bring it with you here today?

11 A. No. In fact, I don't think I -- I don't think I
12 even have a copy any more.

13 Q. Did you give it back?

14 A. No. Once I used it up, once I read it, there
15 was no need for me to keep it.

16 Q. Is one of the ways in which the people and the
17 Americans are aware of cigarettes is through
18 advertising?

19 A. Oh, I'm sure they are, yes.

20 Q. Yeah.

21 A. Yes.

22 Q. And in the course of your work did you review
23 the cigarette advertising code of 1964 that the
24 tobacco companies voluntarily entered into?

25 A. Yes.

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1 Q. You did?

2 A. I didn't review it, but I remember looking at it
3 and examining it and reading it, yes.

4 Q. Did you make a determination in your view about
5 whether or not they complied with that code
6 thereafter?

7 A. No, I did not.

8 Q. You didn't look at that?

9 A. No.

10 Q. You weren't interested in that?

11 A. No. That was not my interest, no.

12 Q. So you read the code, but you made no
13 determination and gave -- did no reading at all on
14 whether or not the tobacco companies complied with
15 it?

16 A. No.

17 Q. Did you go out into like Barnes & Noble and find
18 any books on the tobacco industry?

19 A. As a matter of fact, I have.

20 Q. Did you?

21 A. Yes. As a matter of fact, I had.

22 Q. What books did you buy?

23 A. Ashes to Ashes, the Kluger book.

24 Q. Did you read the book?

25 A. Yes, I read it.

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1 Q. Cover to cover?

2 A. I wouldn't say cover to cover, but
3 substantially, yes.

4 Q. So you read Kluger's book?

5 A. Yes.

6 Q. When did you do that?

7 A. When it first came out. That was what? Two
8 years ago. Year and a half, two years ago.

9 Q. Before you agreed to undertake this assignment?

10 A. It was after. I think it came out after I
11 agreed to undertake this assignment.

12 Q. I didn't see that cited in your report, is it?

13 Did I miss it?

14 A. I don't recall whether it was cited because I
15 didn't use it as a basis for my --

16 Q. You read Richard Kluger's book, "From Ashes to
17 Ashes"?

18 A. It may be here. I'm not sure if it is or not.

19 Q. Let's check.

20 A. Huh?

21 Q. Let's check.

22 It's not cited.

23 A. It's not cited?

24 Q. Well, you tell me. But I've looked.

25 A. You have --

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1 Q. Because it's listed alphabetically by author and
2 I'm assuming --

3 A. If that's --

4 Q. And I see no --

5 A. I'll check it through, but if it's not cited,
6 it's not cited. Because it was not really used as a
7 basis of my report.

8 Q. Well, that's --

9 A. It was used for background reading.

10 Q. And that's important. That's what I want to
11 understand. See.

12 So I mean if we find that you've cited it, and
13 we can look further on a break and you can surely
14 come back and correct it, but all I can tell you is
15 I've looked through alphabetically, by author, and
16 there's no Ks.

17 A. Okay.

18 Q. But this, in fact, is the jacket cover that you
19 found, --

20 A. Yes.

21 Q. -- Richard Kluger's book, "From Ashes to Ashes";
22 right?

23 A. Yes.

24 Q. The title -- and you know Richard Kluger is a
25 Pulitzer Prize winner?

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1 A. Yes, I do.

2 Q. And won the Pulitzer Prize for things unrelated
3 to this book?

4 A. That is correct.

5 Q. But is a renowned author, correct? Known for
6 his --

7 A. Respected journalist, yes.

8 Q. Respected journalist.

9 And this says, America's hundred-year cigarette
10 war--the public health and the unabashed triumph of
11 Philip Morris?

12 A. That's correct.

13 Q. Has a picture of a cigarette burning from ashes
14 to ashes; right?

15 A. Uh-huh.

16 Q. This is just the jacket cover, right?

17 A. Uh-huh.

18 Q. It is a six-, seven-hundred page book; right?

19 A. Yeah.

20 Q. And you read it cover-to-cover?

21 A. Not cover-to-cover.

22 Q. But you read it?

23 A. Uh-huh.

24 Q. Did you also read his other book,

25 "Simple Justice"?

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1 A. I don't recall that. What's the theme of that
2 one?

3 Q. It's on the history of race in America.

4 A. History of race?

5 Q. And particularly --

6 A. No.

7 Q. -- racial issues from a legal standpoint?

8 A. No, I evidently haven't read that one.

9 Q. Okay.

10 MR. PURVIS: I'd like to ask a point of
11 clarification.

12 Is this book on your predesignation list? I
13 don't believe it is.

14 MR. MANNING: It doesn't have to be, counsel.
15 He just acknowledged that he read it.

16 MR. PURVIS: For you to use the document in the
17 deposition, I believe you have to predesignate --

18 MR. MANNING: The document is not marked. And
19 it's not true by way of cross-examination. The
20 document is not marked, so I'm not using the
21 document.

22 MR. PURVIS: You cannot show, according to case
23 management order, documents that have not been
24 predesignated, except for purposes of impeachment.
25 And this document has not been predesignated. And I

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1 think its improper for you to be using it.

2 MR. MANNING: We can take this up at a later
3 time.

4 BY MR. MANNING:

5 Q. Other than "From Ashes to Ashes," what else did
6 you read?

7 A. Are you asking regarding my Barnes & Noble
8 experience?

9 Q. Yes, sir.

10 A. Okay. That's the only book I found at the time
11 I visited Barnes & Noble that had any kind of bearing
12 on this particular question.

13 Q. But when you went to Barnes & Noble you went and
14 you asked somebody, presumably, is there anything on
15 tobacco in here?

16 A. No.

17 Q. You just ran across it yourself?

18 A. That is correct.

19 Q. When you were pouring through the stacks?

20 A. That is correct.

21 Q. You ran across the book and you bought it?

22 A. That is correct.

23 Q. Did you charge for the purchase of that book in
24 the course of your research?

25 A. No, I did not.

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1 Q. That wasn't an item that --

2 A. That was not an item.

3 Q. You're absolutely confident that wasn't charged

4 for?

5 A. I'm absolutely confident.

6 Q. Okay. And you made a determination that that

7 book had no relevancy at all to your work; correct?

8 A. Pretty much, yes.

9 Q. And the way in which you made that determination

10 was that you said, "This book doesn't really have

11 anything to do with the historical analysis of the

12 tobacco industry"?

13 A. No, I didn't say that.

14 Q. Because, in fact, the book had a great deal to

15 do with the historical analysis of the tobacco

16 industry, did it not, sir?

17 A. It certainly did.

18 Q. And it was written by a Pulitzer Prize winner?

19 A. Yes, it was.

20 Q. And you don't have one mention of it in your

21 report, do you?

22 A. No.

23 Q. And in that book there is a discussion of

24 tobacco company documents in general and

25 specifically, correct?

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1 A. I recall that being in the book, yes.

2 Q. And you read it, right?

3 A. Yes.

4 Q. And that hasn't found its way in one shape or
5 form into your report; --

6 A. That is correct.

7 Q. -- has it?

8 And in the course of the more than at least ten
9 meetings that you had with lawyers from here at
10 Dorsey, to Chicago, to Washington, D.C. -- did you
11 visit any other cities besides Chicago and
12 Washington?

13 A. No.

14 Q. In Chicago or Washington you never mentioned to
15 these lawyers for the tobacco industry that you read
16 Richard Kluger's book, "From Ashes to Ashes," did
17 you?

18 A. I don't recall mentioning it, no.

19 Q. Did you discuss it with David and Michael?

20 A. We may have. I'm not sure.

21 Q. Did they read it?

22 A. I'm not sure. I don't think so.

23 Q. Why do you say that?

24 A. Unless they took it out of the library.

25 My copy remained in my -- in my home and they

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1 didn't take it.

2 Q. You met in your home more than once with them,
3 right?

4 A. Oh yes.

5 Q. And the jacket cover remained on the book?

6 A. Yes.

7 Q. Do you keep jacket covers on books?

8 A. Generally.

9 Q. It's a fairly obvious jacket cover, isn't it,
10 "From Ashes to Ashes"?

11 A. Yes.

12 But it was on the shelf.

13 Q. But it was on the shelf.

14 But they're academics, right?

15 A. Yeah.

16 Q. Academics do like to look at other people's
17 books?

18 A. Yes.

19 Q. And you don't recall whether they ever looked
20 through and saw that book?

21 A. I don't recall that.

22 Q. Or expressed any interest in reading it?

23 A. I don't recall that, no.

24 Q. No other books?

25 MR. PURVIS: Object to the form.

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1 BY MR. MANNING:

2 Q. Any other books you read?

3 A. Oh, I read many books, but --

4 Q. On tobacco?

5 A. On tobacco, but not out of the Barnes & Noble
6 experience.

7 Q. How about out of the library? How about a book
8 called "Smoke Screen"? Have you read that?

9 A. "Smoke Screen"?

10 Q. "Smoke Screen"?

11 A. I have no recollection of that one.

12 Q. No recollection of that one, huh?

13 A. No.

14 Q. How about a book titled, "The Cigarette Papers"?

15 A. Sorry?

16 Q. "The Cigarette Papers," with a forward by the
17 Surgeon General, Everett Koop, the former --

18 A. I recall coming across that on one of my
19 Internet searches, yes.

20 Q. Did you pull it down?

21 A. No, I did not.

22 Q. You read portions of it?

23 A. I read what, in fact, it included and came to
24 the conclusion that it was not pertinent to my
25 research topic.

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1 Q. Well, in fact, what it concluded -- when you
2 read what it included, what it included was a
3 thorough historical analysis of tobacco company
4 documents? You recall that on the Internet?

5 A. Certainly.

6 Q. You recall that, right?

7 A. Yes, certainly I recall that.

8 Q. So here you were on the Internet reading "The
9 Cigarette Papers," written by four academics?

10 A. I wasn't reading it. I read a book about them.

11 Q. I understand that. Reading about them, a book
12 written by four academics; right?

13 A. Uh-huh.

14 Q. It's written on, as you know, a historical
15 analysis of the tobacco company documents; correct?

16 A. That is correct.

17 Q. And you, as an objective historian, an expert,
18 did not read further; correct?

19 A. That is correct.

20 Q. And you, as an objective historian, did not ask
21 your two colleagues to read that book?

22 A. That is correct.

23 Q. And you, as an objective historian, did not ask
24 one of the twelve people who were working under your
25 direction in Washington D.C. to read those books?

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1 A. No.

2 Q. Or that book?

3 A. No.

4 Q. How many people did you have working for you
5 total? Fourteen?

6 A. No. I think in Washington there was six maybe.

7 Q. Six? Okay. But the answer remains the same, --

8 A. I did not ask one of those six --

9 Q. -- you didn't ask one of those six to read that?

10 A. No.

11 Q. And you don't know whether those six were aware
12 of it?

13 A. No, I have no way of knowing.

14 Q. And you don't know whether David or Michael were
15 aware of it?

16 A. I have no way of knowing that either.

17 Q. Would you agree with me that as younger
18 individuals they're more, generally, I'll say this is
19 certainly true for myself, generally more computer
20 literate than you are, they're a little more faciled
21 with the Internet, et cetera?

22 A. Both of them, yes, I would say that.

23 Q. They live on it a little more, use it more, the
24 way their training was?

25 A. Certainly, yes.

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1 Q. So you think they probably ran across it, as
2 well?

3 A. Could be.

4 Q. You just don't know?

5 A. Could be.

6 Q. What else have you ran across on the Internet
7 related to smoking and cigarettes?

8 A. I don't recall anything specifically beyond
9 that, except for perhaps, you know, the ongoing
10 account of the various maneuvers regarding settlement
11 and non-settlement that came up on CNN or, USA Today,
12 or the New York Times online, or even the
13 Star Tribune online.

14 Q. You read all that with interest?

15 A. I wouldn't say I read it all. I -- I looked at
16 it, yes.

17 Q. Other than Richard Kluger's book "From Ashes to
18 Ashes," other than the book, "The Cigarette Papers,"
19 which you ran across on the Internet and saw the
20 description of the book as a historical analysis of
21 tobacco company documents, are there any other things
22 that you recall that you've run across that aren't
23 cited in your report?

24 A. Hundreds and thousands of specific articles in
25 newspapers are not cited here.

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1 Q. I understand that. But Richard Kluger's
2 book --

3 A. In terms of books?

4 Q. Yes, sir.

5 A. Is that what you're asking?

6 Q. Yes. Books.

7 A. In terms of books. No.

8 Q. Have you now read all the surgeon general's
9 reports? Or have you only still just read the '64
10 report?

11 A. I read the '64 report and, if I'm not mistaken,
12 the '88 report. Those in between I've read summaries
13 of. And New York Times and other detailed accounts
14 of those reports.

15 Q. Have you read the '94 surgeon general's report
16 on youth and smoking?

17 A. No, I have not.

18 Q. Have you interacted with any of your colleagues
19 at the University of Minnesota in any way, shape, or
20 form regarding tobacco?

21 A. What do you mean by interaction?

22 Q. Have you interacted with them in any way, shape,
23 or form regarding tobacco in any way?

24 A. My colleagues knew of the research project I was
25 working on, yes.

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1 Q. The colleagues in your History Department?

2 A. In the History Department.

3 Q. How about in any other departments, like

4 Dr. Perry?

5 A. Pardon me?

6 Q. Have you ever interacted with Dr. Perry?

7 A. No, no.

8 Q. So who are the colleagues in your

9 History Department that knew of your research?

10 A. Whom I --

11 Q. Who knew of it?

12 A. Just about everyone, I think.

13 Q. Does it have to be approved by the Dean before

14 you undertake it?

15 A. No.

16 Q. You have complete autonomy as to any project you

17 undertake?

18 A. No.

19 Q. Tell me why you don't have complete autonomy.

20 A. This is done as a consulting arrangement and,

21 therefore, I have to conform to the University's

22 policies on consultation.

23 Q. What are those?

24 A. I had to first get approval of consultation

25 arrangements. And then get annual reports of

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1 consultation.

2 Q. Who approved it, the consultation arrangement?

3 A. Chairman of the Department, the Dean. The
4 Academic Vice President.

5 Q. Who are those people by name?

6 A. At the time that this was done the Chairman of
7 the History Department was Kinley Brauer.

8 Q. Kinley?

9 A. Brauer. B-R-A-U-E-R.

10 The Dean at the time this was done was
11 Dean Julia Davis.

12 And I really don't recall who the Academic
13 Vice President at the time was. We have so many
14 coming and going, that I don't remember who it was
15 that... The change of administration and things like
16 that.

17 Q. Did you talk to them verbally to get approval?

18 A. No.

19 Q. Send a memo?

20 A. Pardon me?

21 Q. Did you send a memo?

22 A. No.

23 Q. How did you do it?

24 A. Filed a form.

25 Q. Do you have that form?

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1 A. No.

2 Q. Is it thrown away?

3 A. Pardon me?

4 Q. You threw it away?

5 A. That's not for me to keep.

6 Q. You sent the form to them and they keep it?

7 A. That's right.

8 Q. So they have the form?

9 A. That's correct.

10 Q. What did you say on the form?

11 A. I'm doing consulting work with a law firm of
12 Dorsey and Whitney, through the University Research
13 Consortium, on pending litigation in which historical
14 questions are -- are being researched. Something to
15 that nature.

16 Q. Did you disclose to them that you were going to
17 be paid by the tobacco industry?

18 A. No.

19 Q. You didn't?

20 A. No.

21 Q. Why didn't you do that?

22 A. That was not asked for in the report.

23 Q. Okay. And you didn't think it was relevant?

24 A. No. Because it could have been on many other
25 issues that Dorsey and Whitney would have asked me to

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1 work on.

2 Q. But there wasn't, was there?

3 A. No.

4 Q. And you knew what Dorsey & Whitney was asking
5 you to work on --

6 A. But we kept it that way so there'd be opening
7 for that.

8 Q. I'm sorry? I don't understand.

9 A. Historical research, in connection with pending
10 litigation, was the way it was put.

11 Q. But you didn't tell them, so I'm clear, the
12 Academic Vice President, the Dean, or --

13 A. Chair.

14 Q. -- the Chair of your department, that you in
15 fact were being paid by the tobacco industry?

16 A. So far as I know I was being paid by the
17 University Research Consortium.

18 Q. Oh, we've already gone through this and
19 established --

20 A. I know that, but --

21 Q. But you knew full well --

22 A. If you want to insist on that, I'll insist on
23 that, as well, you know.

24 Q. No, no, no, no. Listen.

25 A. As far as I'm concerned, the University Research

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1 Consortium was what was paid.

2 Q. But I'm not asking you as far as you were
3 concerned. What I'm asking you is what your
4 knowledge was.

5 Do you not agree with me that we have previously
6 already clearly established that very early on,
7 within the first two weeks, you knew full well that
8 the money that would come into your pocket would come
9 from the tobacco companies?

10 A. That is correct.

11 Q. And you did not disclose that on this form to
12 the Chairman or the Academic Vice President; correct?

13 A. It wasn't asked for.

14 Q. I understand that's your view, that it wasn't
15 asked for.

16 A. It wasn't asked for.

17 Q. But I don't know that unless I see the form;
18 right?

19 A. Yes.

20 Q. You could get that form by asking them for it;
21 right?

22 A. I assume so. I don't know where the form is
23 filed, but I'm sure you could find out.

24 Q. Then you had to file annual reports, too?

25 A. I had to file an annual report, yes.

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1 Q. Is that a form, too?

2 A. That's also a form.

3 Q. And who is that sent to?

4 A. I guess to the same channels.

5 Q. Same ones?

6 A. I assume.

7 Q. And does the consortium group have to file these
8 same reports, too, I presume?

9 A. I don't know.

10 Q. You just don't know?

11 A. I don't know.

12 Q. We'd have to ask her, whatever, Ellen
13 Fitzgerald?

14 A. Right.

15 Q. What did you say on the annual report, to your
16 knowledge?

17 A. All the annual report asks is whether I was
18 complying with the University consulting policy and
19 not exceeding the time limitations.

20 Q. What are those?

21 A. That during the academic year they are not to be
22 more than one day per week.

23 Q. Did you exceed that?

24 A. No.

25 Q. Never?

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1 A. Never.

2 Q. Okay. Can you go beyond one day a week if
3 you're not teaching that quarter?

4 A. I never was in a position of not teaching any
5 quarter during the last few years.

6 Q. You also teach all summer sessions?

7 A. Oh no. That's another matter.

8 Q. You just teach fall, winter, and spring
9 quarters?

10 A. Fall, winter, and spring.

11 Q. In the summer you can work as much as you want?

12 A. That is correct.

13 Q. Did you ever ask anybody to see the testimony of
14 the tobacco executives in front of Congress?

15 A. No.

16 Q. Are you aware that they did so testify in 1994?

17 A. I am aware, yes.

18 Q. Are you aware of that from the New York Times?

19 A. Yes.

20 Q. Any other sources?

21 A. I think perhaps the nightly news on television.

22 Q. What is your awareness, as a historian, of what
23 was said in the press about their testimony?

24 A. I have no awareness as a historian regarding
25 that testimony.

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1 Q. None?

2 A. Not as a historian, no.

3 Q. As an individual.

4 A. Well, as an individual, yes.

5 Q. What do you remember?

6 A. My recollection is that, "What do you expect
7 them to say?"

8 Q. No, no, no. That's --

9 A. No.

10 Q. Tell me more about that. What do you mean?

11 A. Well, after all, they're trying to protect their
12 industry, I assume. And, therefore, they're saying
13 what they have to say, period.

14 Q. So you -- as an individual do you believe it's
15 legitimate for someone to say what they need to say
16 to protect their industry, irrespective of whether
17 it's the truth?

18 A. I have no position on that as a historian, no.

19 Q. You have no position on that as a historian?

20 A. No.

21 Q. So as a historian you have no position on
22 whether or not someone who is testifying in Congress,
23 as the chief executive officer of a major
24 multi-national company, should in fact tell the
25 truth?

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1 A. Oh.

2 Q. You have no opinion on that?

3 A. As a person I agree.

4 Q. That they ought to tell the truth?

5 A. Certainly, yes.

6 Q. Right.

7 A. I assume they were under oath.

8 Q. Right. Right.

9 A. That answers your question, I assume.

10 Q. No.

11 Next question.

12 You assumed they were under oath, right?

13 A. Yes.

14 Q. You assumed that they told the truth?

15 A. I assumed under oath they are compelled to tell
16 the truth.

17 Q. Previously you told me that you assumed that
18 they would say what they needed to say to protect
19 their company; correct?

20 A. Within the truth.

21 Q. You believe within the truth?

22 A. Within the truth, yes.

23 Q. Do you have a recollection as an individual of
24 what they said about whether or not cigarettes and
25 cigarette smoking causes cancer?

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1 A. In that '94 --

2 Q. Yes, sir.

3 A. -- testimony?

4 No, I don't recall that at all.

5 Q. You don't recall that at all?

6 A. No.

7 Q. Do you have a recollection of what they said
8 about whether cigarette smoking is addictive?

9 A. Yes, I do recall that.

10 Q. What did they say?

11 A. They said no.

12 Q. And did you assume that they were telling the
13 truth when you read that?

14 A. I assumed that they were telling the truth as
15 they saw the truth.

16 Q. As they saw the truth?

17 A. Yes.

18 Q. Which was to protect their company?

19 A. And also to tell the truth within that
20 parameter.

21 Q. To tell the truth, to protect the company, they
22 could say it was not addictive; is that right?

23 A. Within the definition, as they perceived it,
24 yes.

25 Q. And you knew that what they were saying about

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1 addiction, under oath to Congress, that was in your
2 view contrary to what the American people and the
3 people of Minnesota believed; correct?

4 A. That is correct.

5 Q. And that was your opinion about what people
6 believed; correct?

7 A. That is correct. By historical judgment.

8 Q. Right. Now, if in fact -- if in fact --

9 A. Pardon me.

10 Q. Go ahead.

11 A. Let's go back.

12 In '94 I had no historical judgment on this. I
13 had not yet started working --

14 Q. Hadn't started working?

15 A. So I'm sorry. I have to back off on that
16 particular answer.

17 Q. If in fact, sir, -- if in fact in '94 those
18 chief executive officers had stood up, under oath,
19 and said, it is addictive, it is absolutely addictive
20 and, yes, we have known that for a long period of
21 time. That, you would agree with me, would have some
22 impact on awareness in the American people and the
23 people of Minnesota about addiction; correct?

24 A. Not really.

25 Q. Well, it might be reported in the press if they

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1 said that, don't you think?

2 A. Yes.

3 Q. Don't you think?

4 A. Oh certainly.

5 Q. And your view -- that's great. That's
6 wonderful.

7 Let's be clear about that. Your view is that if
8 the chief executive officers of the six largest
9 tobacco companies in the world, stated publicly that
10 cigarette smoking is addictive, that it would have
11 not really any impact on awareness?

12 A. That's exactly what I'm saying.

13 Q. Okay. Great.

14 And yet you do believe that if the Boy Scouts of
15 America said in 1961 that cigarette smoking was
16 addictive, that it would have an impact on the
17 awareness of the American people?

18 A. Of the Boy Scouts.

19 Q. Of the Boy Scouts?

20 A. (Nodding.)

21 Q. Okay. But no one else, just the Boy Scouts?

22 A. The Boy Scouts and whomever they come into
23 contact with and have influence upon and so on.

24 Q. Good. When you began to do your historical
25 analysis did it cross your mind that your conclusions

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1 about the widespread knowledge, as you concluded, of
2 people's knowledge of addiction, was at odds with
3 this testimony that you were aware of in 1994?

4 A. I never thought of it.

5 Q. You just didn't think about it?

6 A. No.

7 Q. When you went to that big meeting in Chicago
8 with twenty-four lawyers you didn't ask them about
9 it?

10 A. No.

11 Q. No?

12 You say in your report here, sir, on page six,
13 "Further, I may review additional materials produced
14 or to be produced by plaintiffs in this matter,
15 including future deposition transcripts and the
16 exhibits thereto"; do you see that?

17 A. Yes, I do.

18 Q. Have you asked for the testimony of the tobacco
19 executives?

20 A. No, I have not.

21 Q. Do you intend to so ask?

22 A. No, I do not.

23 Q. Have you asked for the testimony of the tobacco
24 scientists?

25 A. No, I have not.

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1 Q. Do you intend to ask for it?

2 A. No, I do not.

3 Q. Not interested in it; correct?

4 A. That's correct.

5 Q. Page seven of your report, sir, you said --
6 right there on the top, it's a continuation from the
7 sentence on six, at the bottom, "For many decades
8 citizens of the United States and the State of
9 Minnesota have been aware that cigarettes are
10 potentially harmful to their health, addictive, and
11 that it is risky to use them"; do you see that?

12 A. Uh-huh. I do.

13 Q. Okay. And who said that it was addictive?

14 A. Who particularly?

15 Q. Yeah. Right.

16 A. Oh, very simply. You find it mentioned in every
17 one of the hygiene health science textbooks that were
18 used by the State from 1897 on. Maybe even earlier,
19 but 1897 on. You'll find it in the popular
20 literature. You find it in the -- in the general
21 comments of people who had difficulty breaking the
22 habit. Right down the line. This is the -- the
23 preponderance of evidence is there. You know.

24 Q. Is that it's addictive?

25 A. That it's addictive. Addictive as defined that

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1 way. Hard to break.

2 Q. Have you ever seen the tobacco companies say
3 that it's addictive?

4 A. No.

5 Q. Nowhere in your historical analysis?

6 A. Maybe -- maybe last week, or weeks ago, or three
7 weeks ago, but no.

8 Q. What do you mean two or three weeks ago?

9 A. If I'm not mistaken there was some kind of
10 statement in deposition of some tobacco industry
11 executives regarding addiction.

12 Q. Where did you read that?

13 A. New York Times.

14 Q. And what was the statement?

15 A. I don't recall the exact statement.

16 Q. But that's where you read it, was the
17 New York Times?

18 A. I believe so. Maybe even have been in the
19 Star Tribune.

20 Q. To your knowledge it was reported as that that
21 was the first time that was so stated by the tobacco
22 companies?

23 A. That's how the New York Times reported it, yes.

24 Q. Did you ask, then, for further documents on this
25 topic --

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1 A. No.

2 Q. -- to see what the tobacco company's position

3 had been over a period of time, --

4 A. No.

5 Q. -- historically?

6 A. No.

7 Q. Do you recall in the book, "From Ashes to Ashes"
8 that you read, of Richard Kluger, that it discussed
9 in great detail the internal company documents that
10 admitted it was addictive, but stated what they would
11 say publicly, that it wasn't? Did you read that?

12 A. Yes, I did. I recall reading that, yes.

13 Q. And so when you are attempting to determine the
14 level of awareness, or awareness of a Minnesota
15 population, and the people of America, even though
16 you had read Richard Kluger's book and knew that the
17 tobacco companies' publicly denied the addictive
18 nature of cigarettes -- you knew that, right?

19 A. Uh-huh. Yes.

20 Q. You did not ask for one internal document that
21 would explain why there was this apparent conflict?

22 A. That is correct.

23 Q. And even though you had read Richard Kluger's
24 book that said they knew it was addictive and stated
25 the opposite, to the American people, you did not

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1 explore the apparent dichotomy in these two
2 positions?

3 A. That is right.

4 Q. And you did not scratch the surface to say I, as
5 a historian and a respected academic at the
6 University of Minnesota should make a determination
7 about whether a lie is occurring in this apparent
8 dichotomy, did you?

9 A. I did not.

10 Q. And you did not say, "I need to evaluate first
11 and foremost, seriously here, whether I am a pawn in
12 a lie," did you? You didn't do that?

13 A. That was not what I was doing, no.

14 Q. On page eight, sir, --

15 A. Eight?

16 Q. -- when you cited to the Court --

17 You knew your report was going to be public;
18 right?

19 A. Yes, of course I did.

20 Q. And when you cited all of this Benjamin
21 Franklin, Abraham Lincoln, Oliver Wendell Holmes,
22 John Quincy Adams, --

23 A. I left out some, as well.

24 Q. I understand. And you went back to these
25 statements that are made, you're quoting John Quincy

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1 Adams here, August 1845, about his being addicted to
2 tobacco and two of its mysteries, smoking and
3 chewing, you're not aware of whether anybody in
4 Minnesota was aware of what Adams said, are you?

5 A. What Adams said in 1845?

6 Q. Correct.

7 A. No, I'm certainly aware that no one in Minnesota
8 knew what he was saying in 1845. Because there was
9 no Minnesota in 1845.

10 Q. That's what I thought.

11 So what are you giving an opinion about here,
12 the American people?

13 A. Yes.

14 Q. In 1845?

15 A. Yes. Yes. Yes.

16 Q. So you do intend to give an opinion about the
17 American people and the Minnesota people, after a
18 Minnesota is created?

19 A. Yes.

20 Q. Did it ever strike you, when you read through
21 this and cited this to us from King James in 1604,
22 right through John Quincy Adams, to 1845, and the
23 surgeon general's report you have in here, as well,
24 about -- did it ever strike you--why are all these
25 people saying this and the tobacco companies aren't?

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1 A. No.

2 Q. Never crossed your mind?

3 A. No.

4 Q. When you were putting this in here did you think
5 back to Richard Kluger's book when this dichotomy --

6 A. No.

7 Q. -- that we've already discussed --

8 Let me finish my question.

9 A. I'm sorry.

10 Q. -- when this dichotomy was so clearly pointed
11 out in his book, of what they knew versus what they
12 said?

13 A. No that was not of interest to me. Not
14 historically on this historical project.

15 Q. Correct.

16 And you didn't think you had a responsibility to
17 include that knowledge that you had as an individual,
18 as a result of reading that Pulitzer Prize winner's
19 six hundred page book, did you?

20 A. It had no bearing on what I was doing, right.

21 Q. Okay. Now, let's talk about the rise of
22 cigarette popularity that you do on page nine, okay?

23 A. Uh-huh.

24 Q. Here we have the invention of the safety match?

25 A. Uh-huh.

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1 Q. And then the women's movement?

2 A. Yep.

3 Q. Did you want to ever have an understanding of
4 whether or not tobacco companies targeted women
5 specifically, to get them to become much greater
6 consumers of cigarettes? Did that interest you?

7 A. Not in the context of this particular project,
8 no.

9 Q. Well, but there was a rise of cigarette
10 popularity that you were talking about; correct?

11 A. That is correct.

12 Q. And you wanted to make sure that you include
13 every element of why it's rising in popularity,
14 correct, as a historian?

15 A. Yes. Yes.

16 Q. Right.

17 And one of those is the women's movement?

18 A. Yes.

19 Q. Along with the safety match, and the Depression,
20 and a lot of other things?

21 A. Yes.

22 Q. The major world wars; right?

23 A. Surely, yes.

24 Q. But surely one of the things that could also
25 impact specifically women is that if they target

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1 women, the tobacco companies, in a very specific,
2 concerted way, to make sure that they go out to get
3 women to smoke in the same numbers, if they can, that
4 men are doing it as a result of the wars and whatnot;
5 did you see that?

6 A. Is that a possibility, are you asking me?

7 Q. Yeah.

8 A. Certainly it's a possibility.

9 Q. Were you interested in that possibility?

10 A. Not as a major factor, no.

11 Q. Did you see it discussed in Kluger's book?

12 A. Yes.

13 Q. And, again, you knew about it in your head from
14 reading his book when you were writing this?

15 A. Yes.

16 Q. But you didn't include it?

17 A. No.

18 Q. Well, how about the rise of cigarette popularity
19 and the targeting of kids? Have you ever seen it
20 discussed anywhere, that cigarette companies
21 specifically go after teenage kids to get them
22 addicted?

23 A. I've seen such charges made, yes.

24 Q. Where?

25 A. I've seen it throughout the literature, in the

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1 New York Times particularly. And claims made by
2 different advocates of various kinds, yes.

3 Q. Did you see it in the complaint that you read?

4 A. I saw it in the complaint.

5 Q. And when you read the complaint did you -- you
6 know, ask anybody in the room that you were with
7 there that day, when the people gave it to you at
8 Dorsey in the meeting, and then all of those
9 follow-up meetings, did you ever ask anybody whether
10 what was stated in the complaint was true?

11 A. I had a very limited interest.

12 Q. I understand that. That's what you say. But my
13 question --

14 A. The answer to your question is no.

15 Q. That's my point. Is that you were given a copy
16 of the complaint; as a historian and as an individual
17 you read the complaint, and in at least -- shall we
18 say in excess of ten meetings you've had with lawyers
19 in total, is that fair?

20 A. Yes.

21 Q. At least ten meetings you had with lawyers,
22 having read the complaint in this case, you didn't
23 ask once whether any of the allegations in it were
24 true, --

25 A. No.

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1 Q. -- did you?

2 A. No.

3 Q. And you did not and never have undertaken any
4 analysis at all to determine whether or not tobacco
5 companies go after kids?

6 A. I'm sorry.

7 Q. You have never undertaken any analysis
8 whatsoever to determine whether tobacco companies go
9 after kids, have you?

10 A. No, I have not.

11 Q. And you saw it talked about in Kluger's book;
12 right?

13 A. I don't recall seeing it in Kluger's book, but
14 it could have been there, yes.

15 Q. You saw it talked about in the complaint?

16 A. Yes.

17 Q. As an individual, and as a citizen of the State
18 of Minnesota, you find it reprehensible that people
19 would intentionally go out and try to get twelve- and
20 fifteen-year-old kids addicted, do you not?

21 MR. PURVIS: Object to the form of the question.

22 BY MR. MANNING:

23 Q. You do find it reprehensible, correct?

24 A. You're asking me as a historian? I didn't do
25 research on that.

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1 Q. I'm asking you as a historian and an
2 individual.

3 A. As a historian I have no view on that.

4 Q. As an individual?

5 A. Yes.

6 Q. It's reprehensible?

7 A. Yes.

8 Q. And as an individual you made no effort
9 whatsoever to determine whether those allegations
10 were true, even though you knew that those were
11 allegations?

12 A. No, I have made no such effort.

13 Q. And you made no such effort as an individual or
14 as a historian; correct?

15 A. As a historian it was not part of my research
16 design, no.

17 Q. And you made no effort as individual, --

18 A. As an individual --

19 Q. -- or a historian?

20 A. -- I assumed this will come out with the wash.

21 Q. Okay. That's what you did as an individual; is
22 that right?

23 A. Uh-huh.

24 Q. Is that right?

25 A. Yeah.

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1 Q. On the bottom of page nine you have, "Backlash
2 Against Cigarettes."

3 A. Uh-huh.

4 Q. And you state there in the fourth sentence,
5 "Although the attack on cigarettes had a strong
6 religious and moral component..." do you see that?

7 A. Yes, I do.

8 Q. You found historically that there was a moral
9 component?

10 A. Absolutely.

11 Q. And you analyzed that moral component; correct?

12 A. Yes, I did.

13 Q. And so is there a moral component to targeting
14 kids, to get them to smoke and get them addicted? Is
15 there?

16 A. That was not the issue that was raised at this
17 particular time, but the moral component had to do
18 with the general impact that cigarettes had on the
19 morality of those who smoke.

20 Q. So you were concerned about the morality of
21 those smokers; is that right?

22 A. That's -- I'm reporting what I found in terms of
23 the literature.

24 Q. Right. But you were at least looking to some
25 degree at the issue of morality; correct?

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1 A. No.

2 Q. You were looking at --

3 A. The others were looking at morality. I'm
4 reporting what they're saying regarding morality.

5 Q. Yes. You were reporting what others were
6 looking at, --

7 A. Yes.

8 Q. -- vis-a-vis morality?

9 A. Exactly.

10 Q. But as we've established, at minimum, through
11 the complaint you became aware that there was a
12 moral, legal, and ethical charge about targeting
13 kids; correct?

14 A. In the complaint it so appears, yes.

15 Q. And at least as an individual, as well as a
16 historian, you took no interest in that moral issue;
17 correct?

18 A. As a historian, that was not my research
19 project.

20 Q. Even though you saw it in the complaint?

21 A. Certainly.

22 Q. And even though you ran across moral issues in
23 your historical analysis?

24 A. Yes.

25 Q. Now lying, you would agree, is a moral issue?

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1 A. Of course.

2 I think -- I think we can make the assumption
3 that the Ten Commandments would be part of the moral
4 issue.

5 Q. You bet. You bet.

6 Did you make a determination about whether the
7 Anti-Cigarette League had an impact on decreasing
8 smoking or increasing smoking?

9 A. I don't think I made a determination one way or
10 another on that, no.

11 Q. If the Anti-Cigarette League's impact was to
12 increase smoking --

13 A. No, it certainly didn't have that impact.

14 Q. How are you aware of that?

15 A. Pardon me?

16 Q. How are you aware of that?

17 A. Obviously those were influenced by the
18 Anti-Tobacco League, or the Non-Tobacco League,
19 whatever the various things were called at the time.
20 They certainly would not be smokers. Or if they were
21 influenced by them, they would quit smoking if they
22 were smokers.

23 And there are many such -- evidence of testimony
24 in the various journals that the various leagues put
25 out. Testimonies regarding "I was a heavy smoker and

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1 I stopped smoking because I've seen the light. It's
2 bad for you. It's immoral. It's unhealthy." And
3 all that kind of stuff. I've seen that, yes.

4 As far as its impact on increasing smoking, I
5 would think that that would not be their objective.

6 Q. I understand that, sir.

7 A. Yeah.

8 Q. My point is did you do any analysis to see
9 whether or not their efforts caused some people to
10 start smoking who said, "Ah, they're quacks, you
11 know, I don't like them. I'm on the other side of
12 the issues politically from them." Did you look at
13 that at all?

14 A. No, not really.

15 Q. It wouldn't necessarily be in the historical
16 documents, would it?

17 A. No, it wouldn't find its way in there. It could
18 be indirectly, but it wouldn't be directly, no.

19 Q. Right. It could be or it could not be?

20 A. Yeah, that's right.

21 Q. And that's just one example of lots of things
22 that may or may not be in historical documents;
23 correct?

24 A. That is correct.

25 Q. So historical documents are limited as to what

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1 they can tell us?

2 A. Any particular historical document, taken by

3 itself out of context, yes.

4 Q. Any group of historical documents may not touch

5 on certain issues, as well?

6 A. The likelihood is slimmer that that would be the

7 case.

8 Q. But this issue, for example, on the impact on

9 whether increase or decrease, because you would agree

10 that there would be no way of reporting the increase?

11 A. Right.

12 Q. Correct?

13 A. That's correct.

14 Q. Now, in response to any anti-campaign, whatever

15 it is, Anti-Cigarette League, or whatever, there may

16 be documents in the tobacco companies about whether

17 it causes a decrease or an increase? They would know

18 by the sales of their cigarettes; right?

19 A. They may, yes.

20 Q. And you didn't ask for that information to

21 complete the historical picture, did you?

22 A. No, I did not ask for that information.

23 Q. All right.

24 A. That information was public.

25 Q. Was public?

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1 A. Yes.

2 Q. What information was public?

3 A. Regarding the sales of tobacco products and --

4 I've seen references to so many billions of
5 cigarettes consumed in a particular year, up from the
6 last year, or down from the last year. Depending on
7 that -- I didn't have to go to the tobacco companies
8 for that.

9 Q. In fact, you went to the surgeon general's

10 reports --

11 A. Pardon me?

12 Q. You went to the surgeon general's report for
13 most of that, didn't you?

14 A. That is correct.

15 Q. Right.

16 And the first surgeon general's report was in
17 what year?

18 A. '57, I believe, was the first surgeon general's
19 report.

20 Q. So that information wasn't public prior to then,
21 to your knowledge, was it?

22 A. I don't recall.

23 I seem to recall, I seem to remember, seeing
24 such figures published in the newspapers annually. I
25 may be mistaken. But I seem to recall that in --

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1 prior to '57, yes.

2 Q. Okay. But you don't remember where?

3 A. I don't remember where.

4 Q. Did you specifically do any reading on the
5 impact that anti-cigarette sort of efforts have with
6 respect to kids?

7 A. With respect to kids?

8 Q. Kids. Youth.

9 A. Yes.

10 Q. What did you read there? What did you become
11 aware of there?

12 A. In the literature of these various groups.

13 Q. Yes. What did you become aware of?

14 A. When did I become aware?

15 Q. What did you become aware of --

16 A. Oh.

17 Q. -- about the effect of anti-cigarette smoking
18 messages on kids, if anything?

19 A. That essentially the anti-cigarette smoking --
20 anti-tobacco, anti-cigarette, whatever, groups, had,
21 was in fact to galvanize actions on the part of
22 groups in the society that had a direct impact on
23 children to keep smoking materials out of the hands
24 of children. That's -- throughout the literature
25 that is very, very clear, and specific.

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1 Q. Did you make any determination as to whether or
2 not it was effective?

3 A. Again, the question of effectiveness would have
4 to be defined. In terms of did it have an impact?

5 Yes, it did.

6 Q. What impact did it have?

7 A. It led to the passage of legislation leading to
8 the restriction of the sale and purchase of
9 cigarettes by minors. It led to the introduction of
10 mandated curriculum materials, having to do with the
11 health hazards, as well as the moral hazards of
12 smoking and alcohol, tobacco and alcohol.

13 Q. Did it decrease the number of kids smoking, to
14 your knowledge?

15 A. I have no way of knowing that.

16 Q. Well, were you aware that at the same time that
17 these efforts to prevent kids from smoking, by way of
18 education and whatnot were occurring, were you aware
19 by the allegations in the amended complaint, at a
20 minimum, that the tobacco companies were doing
21 everything in their power, through advertising and
22 promotions, to negate that influence and to have kids
23 start smoking? Were you aware of that?

24 A. I'm aware that such allegations are made, yes.

25 Q. And you were aware of that from the amended

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1 complaint?

2 A. Pardon me?

3 Q. You were aware of that from the amended

4 complaint?

5 A. Yes. Among other places, but the amended

6 complaint, yes.

7 Q. And the other place -- one other place, at

8 least, was Kluger's book?

9 A. Yes.

10 Q. And another place was the press?

11 A. Yes.

12 Q. What are the other places?

13 A. That's about it.

14 Q. And even though you were aware of that, from the

15 sources you've described, you have made statements in

16 your report that at least give the distinct

17 impression that these efforts to educate had some

18 positive impact --

19 A. Yes.

20 Q. -- on reducing kids smoking; correct?

21 A. Yes. Yes.

22 Q. And you do not know whether that is true,

23 because you've not evaluated that vis-a-vis the

24 efforts of the tobacco companies to counteract it?

25 A. No.

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1 MR. PURVIS: Object to the form of the question.

2 BY MR. MANNING:

3 Q. And so you don't know to what degree the
4 educational efforts over a period of time about
5 telling children about the consequences of smoking
6 have, when a counter-effort is occurring? You just
7 don't know, do you?

8 A. No.

9 Q. And in your view that's not part of this
10 historical analysis that you were performing; right?

11 MR. PURVIS: Object to the form.

12 BY MR. MANNING:

13 Q. Correct?

14 A. I can't answer that question in a yes or no
15 manner, no.

16 Q. If you want to answer it, go ahead.

17 A. Pardon me?

18 Q. If you want to answer it differently, go right
19 ahead.

20 A. It was not my interest to look at company
21 efforts, but rather to look at societal efforts.

22 Q. You would agree with me, when there are only six
23 companies in America that dominate and impact the
24 smoking behavior of Americans, as well as kids, that
25 they then become a relevant part of the equation if

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1 you're going to talk about smoking behavior?

2 A. Not necessarily.

3 Q. Okay. And the reason you didn't look at them is
4 because of not necessarily?

5 A. That's correct.

6 Q. We at least know that -- if you look at page
7 twelve and the top of page thirteen, where you talk
8 about Sperry, --

9 A. Yes.

10 Q. -- Lyman Beecher Sperry -- she -- or he
11 addressed the importance of using scientific research
12 in the instruction of smoking's hazards, right?

13 A. Uh-huh.

14 Q. He says that the arguments against tobacco do
15 not come from, "The crotchets of hair-brained
16 reformers"; right?

17 A. Uh-huh.

18 Q. That's at least how this individual was
19 perceiving a number of the reformers; correct?

20 A. No.

21 Q. Well, what's your view of that?

22 A. This is -- I've read his report; therefore, it
23 is absolutely an incorrect way of characterizing it.

24 Q. Tell me why.

25 A. He was, in fact, talking to the view that many

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1 people had, that these weren't the crotchets of
2 hair-brained reformers. He didn't believe that
3 himself.

4 Q. In fact, he thought it was based on science and
5 research?

6 A. Yes.

7 Q. Correct?

8 A. And it should be, even more so, based on science
9 and research.

10 Q. Right.

11 A. Right.

12 Q. Not on the crotchets of hair-brained reformers?

13 A. Uh-huh.

14 Q. Correct?

15 A. That's right.

16 Q. All right. And he was acknowledging that some
17 people may perceive the reformers with those
18 adjectives?

19 A. Absolutely, yes.

20 Q. All right. And how people perceive something
21 impacts their degree of awareness of something;
22 correct?

23 A. Yes.

24 Q. And we just have no idea back in 1890 how
25 numbers of people perceived one thing versus another?

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1 A. No.

2 Q. It's not been quantified at all by you; correct?

3 A. Or by anyone.

4 Q. By anyone?

5 A. Yes.

6 MR. MANNING: Let's take a short break, please.

7 (Recess taken.)

8 BY MR. MANNING:

9 Q. Sir, have we talked about everybody that you met
10 with in our -- I want to make sure that I've asked
11 you, as you sit here right now, about your knowledge
12 of everybody you met with in preparation for your
13 opinion -- your testimony here today. I want to
14 recount all those --

15 A. Pardon me?

16 Q. I don't want to recount all those, --

17 A. Yes, I remember whom --

18 Q. Right.

19 A. Um --

20 Q. Any other meetings or anybody else that you met
21 with that in any way relates to this case, your
22 opinion, your report, that we haven't talked about?

23 A. Well, I did meet with Professor George Green.

24 Q. Who is that?

25 A. Professor George Green is a member of my

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1 department who is a business historian, who is
2 doing -- who is an expert witness in this case on the
3 history of Blue Cross-Blue Shield.

4 Q. An expert for the tobacco companies?

5 A. Pardon me?

6 Q. An expert for the tobacco companies?

7 A. That's for Dorsey and Whitney, through the
8 University Research Consortium.

9 Q. And when did you meet with him?

10 A. I can't pinpoint the exact date, but it was
11 roughly last fall or winter, during the course of the
12 research.

13 Q. How long did you meet with him?

14 A. About an hour.

15 Q. What was -- who was there?

16 A. I was there. He was there. My two research
17 assistants. And his research assistants.

18 Q. Okay. What was discussed?

19 A. Fundamentally what we were seeking to do was to
20 avoid duplication of effort. That if he came across
21 anything that would be of interest and of
22 significance to my project, he would so inform me.

23 And same thing, we would do for him.

24 Q. What else was discussed?

25 A. Pardon me?

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1 Q. What else was discussed?

2 A. That's it.

3 Q. Can you recall anything else that was said in
4 the meeting?

5 A. Pardon me?

6 Q. Do you recall anything else that was said in the
7 meeting?

8 A. It was all dealing with that kind of question.

9 The question of research, research techniques, and
10 not duplicating efforts, yes.

11 Q. Was there overlap?

12 A. There was -- well, if you -- by that you mean
13 did I get anything from him, and did he get anything
14 from me, I can answer that question.

15 Q. Yes. Fine.

16 A. I got nothing from him. But he did get some of
17 the transcripts of legislative hearings that I had,
18 that had a bearing on health matters and health
19 policy, Blue Cross and Blue Shield.

20 Q. Anything else you remember about the meeting?

21 A. That's about it.

22 Q. Did you discuss what was going on in the press?

23 A. No.

24 Q. That you were reading?

25 A. No.

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1 Q. Did he discuss his discomfort with the
2 assignment?

3 A. No.

4 Q. Did the research assistants discuss their
5 discomfort with the assignment?

6 A. No.

7 Q. Nothing else that you can recall was discussed?

8 A. Nothing else.

9 Q. Anybody else you met with besides
10 Professor Green?

11 A. I mentioned who the other people were.

12 Q. That's my point. We've exhausted all the people
13 you met with?

14 A. So far as I can recall, those were the people
15 that were present.

16 Q. Are there any other experts you had contact with
17 besides Professor Green?

18 A. No.

19 Q. You have not been in any other meetings where
20 other experts were present?

21 A. Not at all.

22 Q. Have you ever visited the Minnesota Document
23 Repository?

24 A. No, I have not.

25 Q. Have you ever asked to visit it?

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1 A. No, I have not.

2 Q. Do you know what it's in it?

3 A. Yes, I do.

4 Q. What?

5 A. Documents that were put on file by both the
6 plaintiff and the defendant in connection with this
7 case.

8 Q. So as a research historian you are aware,
9 sitting with an office at the University, and your
10 home on the West Bank, that there is a Minnesota
11 Repository right downtown here?

12 A. That is correct.

13 Q. And you are aware that in that repository are
14 documents that have been put there by the tobacco
15 industry?

16 A. Yes.

17 Q. And you are aware that documents have been put
18 there by the plaintiffs, as well?

19 A. Yes.

20 Q. And you are aware that within those documents
21 are many historical documents?

22 A. I assume so.

23 Q. Yes. In fact, you would assume that many of the
24 documents reflect a past history of one type or
25 another?

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1 A. That is correct.

2 Q. And you, as an objective, independent researcher
3 and historian, have never asked to go to the
4 Minnesota Repository and look at documents?

5 A. That is correct.

6 Q. Nor have your research assistants asked to do
7 so?

8 A. That is correct.

9 Q. And you cannot say that those documents don't
10 bear on the question that you are researching because
11 you've never seen the documents?

12 A. No, I can't say that.

13 Q. In fact, if you went and looked at the documents
14 you may find that they would bear dramatically on the
15 question that you're researching? You just don't
16 know, correct?

17 A. Not quite.

18 Q. You don't know because you don't know how many
19 documents are there, do you?

20 A. No, I don't know how many documents are there,
21 no. That's true.

22 Q. Do you know whether there's one million or
23 twenty million?

24 A. I don't know the parameters, no.

25 Q. No idea?

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1 A. No. I know it's vast.

2 Q. Yes.

3 A. Voluminous.

4 Q. And there's no way you can comment because
5 you've never looked at them, as to how the historical
6 documents there may bear on your question that you've
7 researched? You just don't know?

8 A. Oh, I --

9 Q. That's what you told me.

10 A. I do know.

11 Q. You know --

12 A. They do not bear.

13 Q. Ah.

14 A. Ah-uh.

15 Q. Great. You know?

16 A. Yes.

17 Q. You know, as an objective historian, --

18 A. Right.

19 Q. -- at the University of Minnesota, that the
20 documents in the Minnesota Repository, placed there
21 by both plaintiffs --

22 A. Uh-huh.

23 Q. The State of Minnesota is the plaintiff, right?

24 A. Yes.

25 Q. And you're speaking about the State of

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1 Minnesota's knowledge?

2 A. That's correct.

3 Q. And documents placed there by Blue Cross and

4 Blue Shield, --

5 A. That's correct.

6 Q. -- and documents placed there by all the tobacco

7 industries, and you don't know whether there's one

8 million or twenty million, but you are ready to say

9 to this jury that you know, that irrespective of a

10 number of documents placed there, included being

11 placed there by the state of Minnesota, that they

12 have no bearing on your issue?

13 A. Yes.

14 Q. Thank you.

15 You've not, to your -- in your view ever been

16 provided an overview of this litigation by lawyers?

17 A. No.

18 MR. PURVIS: Object to the form of the question.

19 BY MR. MANNING:

20 Q. Is that right? You never have been in your

21 view?

22 MR. PURVIS: I'm going to caution Professor

23 Berman not to comment on discussions with counsel.

24 THE WITNESS: Okay. I will not discuss

25 discussions with counsel.

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1 BY MR. MANNING:

2 Q. How many times have you reviewed the amended
3 complaint?

4 A. I think I've seen it the first time -- is that
5 the amended complaint? Was that the original
6 complaint? I have no idea. When you say amended I
7 don't know --

8 Q. Let's just refer to it as complaint.

9 How many times have you referred to the
10 complaint?

11 A. I've read it carefully two years ago.

12 Q. And that's it?

13 A. That's it.

14 Q. You never went back and read it again?

15 A. No.

16 Q. You never asked to see it again?

17 A. No.

18 Q. You never asked whether there were any changes
19 in the complaint?

20 A. No.

21 Q. Do you agree that nicotine is a drug?

22 A. Do I?

23 Q. Yeah. You.

24 A. I have no idea whether it's a drug or not.

25 That's not my area of expertise.

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1 Q. So you have no idea whether nicotine is a drug?

2 A. That's not my area of expertise.

3 Q. Just answer the question.

4 You have no idea whether nicotine is a drug?

5 A. Not as a historian, I have no idea whether
6 nicotine --

7 Q. As a person here, testifying under oath, as an
8 individual, --

9 A. As an individual, yes, I do.

10 Q. What is it?

11 A. It is a drug.

12 Q. And why do you say that?

13 A. Why do I say that?

14 Q. Yeah.

15 A. Because I think that comes out very clearly in
16 the recent surgeon general's reports and so on and so
17 forth.

18 Q. And in your view, as an individual, is the
19 cigarette a nicotine delivery system?

20 A. So it is alleged.

21 Q. Is the cigarette a nicotine delivery system?

22 A. I would assume so.

23 Q. Oh.

24 A. Now I'm talking as an individual, not as a
25 historian.

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1 Q. I understand.

2 A. In this case.

3 Q. Also, as an individual, it's your view that
4 smoking causes cancer; correct?

5 A. Oh absolutely. As an individual. I've not done
6 any independent research on that.

7 Q. You're also aware, based on your historical
8 analysis?

9 A. No question about it.

10 Q. Not even a shadow of a doubt?

11 A. Not even a shadow of a doubt.

12 Q. Okay. And when, as a historian, in your
13 analysis of these documents would you say was the
14 first time in a year, pick a year, that beyond a
15 shadow of a doubt, cigarette smoking caused cancer?

16 A. Sometime in the 1950s.

17 Q. Okay.

18 A. I couldn't pinpoint the exact date. But
19 sometime in the 1950s.

20 Q. Now, I take it that you'd agree then, the 1950s,
21 sometime, beyond a shadow of a doubt, smoking causes
22 lung cancer?

23 A. Yes.

24 Q. 1950s, beyond a shadow of a doubt, it causes
25 larynx cancer?

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1 A. That is correct.

2 Q. 1950s, beyond a shadow of a doubt, it causes
3 pulmonary disease?

4 A. That is correct.

5 Q. 1950s, beyond a shadow of a doubt, it causes
6 heart disease?

7 A. Uh-huh.

8 Q. All these are statements of you as a historian;
9 correct?

10 A. Yes.

11 Q. Same question, 1950s, beyond a shadow of a
12 doubt, it causes oral and mouth cancer; correct?

13 A. I assume so. I haven't seen any specific
14 reference to that, but it may be there.

15 Q. Beyond a shadow of a doubt in the 1950s it
16 causes emphysema?

17 A. Yes.

18 Q. Beyond a shadow of a doubt it causes, in the
19 1950s, beyond a doubt, pancreatic cancer?

20 A. I haven't seen any reference to that, but I
21 assume so.

22 Q. How about bladder cancer?

23 A. I have no idea, but I assume so.

24 All the horrible things, yes.

25 Q. From an ethical standpoint do you agree, sir,

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1 that a manufacturer has a duty to understand the
2 health effects of its products?

3 A. Is that a historical question?

4 Q. Sir, it's a question. If you want to make a
5 distinction whether you're answering that question as
6 an individual or a historian, I don't care.

7 A. Okay.

8 Q. You make that distinction.

9 A. I'll make that distinction.

10 Q. Whenever you want to do that.

11 A. I'll make that distinction.

12 Q. I'm just asking questions.

13 A. As a historian, I have no independent knowledge
14 of that. As an individual, yes.

15 Q. As an individual you agree that a manufacturer
16 has a duty to understand the health effects of its
17 products?

18 A. As an individual I agree, yes.

19 Q. You also agree that from an ethical standpoint a
20 manufacturer has a duty to test its products for
21 their health effects?

22 A. Yes.

23 Q. You also agree that a manufacturer has a
24 responsibility to tell the users of its products what
25 it knows about the health effects of its products?

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1 A. As an individual, yes.

2 Q. Are you aware, sir, as an individual or
3 historian -- and if you want to tell me the
4 difference, go right ahead -- are you aware of the
5 Frank Statement that was made in January of 1954 by
6 the cigarette companies in newspapers all over this
7 country, where they agreed to accept an interest in
8 people's health as a basic responsibility paramount
9 to every other consideration in our business? Are
10 you aware that that statement was made?

11 A. I have seen a copy of that statement from --
12 that was printed as an ad in newspapers, yes.

13 Q. You've seen a copy of that?

14 A. A copy of the ad of that statement that was in
15 fact in an advertisement, I think by the industry, in
16 newspapers. I've forgotten now which. It could have
17 been the New York Times. It could have been the
18 Minneapolis Star. But I've seen such a statement,
19 yes.

20 Q. Are you aware that, in fact, the cigarette
21 industry took out ads all over this country in all
22 the major newspapers from sea to sea in January of
23 1954 that said, quote, "They agreed to accept an
24 interest in people's health as a basic responsibility
25 paramount to every other consideration in our

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1 business"; are you aware of that?

2 A. I'm not aware that it was placed in every
3 newspaper, but I'm aware of that, yes.

4 Q. Major newspapers.

5 A. Yes.

6 Q. Pardon me?

7 A. Yes, I'm aware of that, yes.

8 Q. So you're aware that people in this country,
9 Americans and Minnesotans, became aware that the
10 tobacco companies were pledging to them that their
11 health, that individual's health, my dad's health,
12 they were undertaking a responsibility --

13 MR. PURVIS: Object to the form.

14 BY MR. MANNING:

15 Q. -- to be totally forthright and candid and
16 honest about the health effects of their products
17 paramount over and above anything else? You're aware
18 of that?

19 MR. PURVIS: Object to the form.

20 THE WITNESS: I don't recall the specifics of
21 the statement in 1954. So I couldn't say that that
22 was, in fact, the particular thrust of their
23 statement.

24 BY MR. MANNING:

25 Q. Do you recall that these were the words? That

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1 we agree to, quote, "accept an interest in people's
2 health as a basic responsibility, paramount to every
3 other consideration in our business"; do you
4 recall --

5 A. I don't recall the exact words, but if you say
6 those are the exact words, I accept them, yes.

7 Q. Do you recall, irrespective of whether you
8 recall those were the exact records, that that was
9 the thrust of the ad?

10 A. Yes. Yes.

11 Q. You do?

12 A. Yes, I do.

13 Q. And the way you understood that, as a historian,
14 is that over and above any other interest -- profits
15 or any other interest, the tobacco companies were
16 making people aware in Minnesota and in America, that
17 they were pledging to put health above any other
18 concern?

19 A. That's what the statement stated, yes.

20 Q. That's how you understood it?

21 A. Yes.

22 Q. That's how you, as a historian, understood the
23 pledge that they were making to America?

24 A. I wasn't looking at that as a historian. I was
25 looking at that as an individual.

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1 And in terms of a historian, I looked -- I
2 factored that in, in my -- in all -- in everything
3 else, yes.

4 Q. All right.

5 And so based on that statement, particularly if
6 that statement was repeated numerous times, --

7 A. Uh-huh.

8 Q. Did you see that statement repeated numerous
9 times in the press, and radio, and television, in
10 interviews?

11 A. You mean reporting it?

12 Q. No. Let me finish. I'm sorry.

13 A. That particular --

14 Q. Let me finish.

15 A. Sorry.

16 Q. The message -- there's a message there, isn't
17 there?

18 A. Yes.

19 Q. The message is health above all other concerns.
20 Your health above our profits, that's the message.

21 MR. PURVIS: Object to the form.

22 BY MR. MANNING:

23 Q. Okay. We agree that's the message in the Frank
24 Statement?

25 A. That's my assumption, yes.

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1 Q. Okay. Would you agree that message was
2 repeatedly delivered by the tobacco industry,
3 individual companies and executives, as well as
4 industry groups, repeatedly delivered from the '50s,
5 right on through the '80s? And you were aware of
6 that in your historical analysis?

7 MR. PURVIS: Object to the form.

8 BY MR. MANNING:

9 Q. Correct?

10 A. I have no knowledge of the repeated consistence,
11 so I can't say, no.

12 Q. You did not, in the course of your historical
13 analysis, determine whether or not the Frank
14 Statement was made in 1954, most of the major
15 newspapers across this country, was repeated by the
16 tobacco industry? You didn't do that?

17 A. I have no recollection of seeing it beyond the
18 '54 statement. But it could have been. Could have
19 been.

20 Q. But you don't recollect it?

21 A. Pardon me?

22 Q. You don't recollect it?

23 A. No, I don't recollect it.

24 Q. And it wasn't something that you looked for, was
25 it?

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1 A. If it were in the press, I would have found it.

2 Q. But you didn't specifically look for it, did
3 you? You didn't direct your research assistants to
4 look for it, did you?

5 A. No.

6 Q. And if, in fact, tobacco companies, all of them,
7 knew in 1954 that cigarette smoking, beyond a doubt,
8 caused cancer, and they didn't tell the American
9 people that, then that would be in contradiction to
10 the Frank Statement, wouldn't it?

11 A. Could be, yes.

12 Q. It would be, wouldn't it?

13 A. Uh-huh.

14 Q. Yes?

15 A. I'm sorry.

16 Q. It would be, wouldn't it?

17 A. Yes.

18 Q. And then that would be a lie, wouldn't it, based
19 on your morality --

20 A. Uh-huh.

21 Q. -- and moral standards; correct?

22 A. Yes.

23 Q. And in the course of your historical analysis
24 did you discover statements, many, by the tobacco
25 industry, and individual tobacco companies, that

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1 cigarette smoking was not proven to cause cancer?

2 Did you discover that?

3 A. There was a discussion in -- even in the '50s,
4 early '50s, late '40s, as to the direct causative
5 factor of cigarettes and various disease that was
6 still under debate by various scientific
7 practitioners. I recall that.

8 Q. Where did you see that?

9 A. Pardon me?

10 Q. Where did you see that?

11 A. Among other places, in the television program
12 that Edward R. Murrow put on in "See It Now" on the
13 tobacco controversy.

14 Q. Where did you get that program?

15 A. Got it -- if I'm not mistaken, through the
16 Vanderbilt Archives. And I got it through some of
17 the collections of television materials that were
18 available in the public domain.

19 Q. Were they provided to you by the lawyers in
20 Washington? Did they direct you to them and where
21 they were?

22 A. I don't recall whether it was provided to me by
23 the lawyers, or if we got it through the Vanderbilt
24 University Archives.

25 Q. Was there any information that was provided to

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1 you -- that directed that you go here, you go to
2 Vanderbilt, in those archives you're going to find
3 all this? Was that ever done?

4 A. Not that I recall.

5 Q. Never once? To your researchers?

6 A. They may have suggested that there's something,
7 but I don't recall the specifics of that at all.

8 Q. Well, let's get into that.

9 A. Yeah.

10 Q. They may have suggested to you, as an objective
11 historian, --

12 A. Right.

13 Q. -- where to look?

14 A. No.

15 Q. Never happened?

16 A. No.

17 What they would say is, "Are you aware that the
18 materials -- these kinds of materials may be there?"
19 That's the only kind of thing that I recall having
20 conversations with them about.

21 Q. Okay. So they suggested in a more artful
22 manner -- they said, "Are you aware,
23 Professor Berman, that these materials might be
24 there"?

25 A. And it was very helpful to know that.

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1 Q. And then you went there?

2 A. Yes.

3 Q. Or you directed one of your research assistants
4 to go there?

5 A. Exactly.

6 Q. Or you directed one of the people in Washington
7 to go there?

8 A. No.

9 My research assistants here were the ones that
10 got material of that kind. The ones in Washington
11 did strictly newspaper work.

12 Q. So your researchers here traveled, they went to
13 Vanderbilt?

14 A. No. We can do that by telephone and mail.

15 Q. And they would mail to you tapes --

16 A. That's correct.

17 Q. -- from Vanderbilt Archives of television
18 programs?

19 A. Uh-huh.

20 Q. Is that right?

21 A. Uh-huh.

22 Q. And that's what you watched?

23 A. Yes.

24 Q. How many times did that occur, where people said
25 to you, "Professor Berman, you might find it

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1 interesting to look here," and you did? How many
2 times did that happen in the course of your research?

3 A. Very few. Maybe once, twice. Vanderbilt
4 Archives being one example.

5 Q. And that sticks out in your memory, this TV
6 program you watched?

7 A. Pardon me?

8 Q. That sticks out in your memory, this TV program
9 that you watched?

10 A. That's correct. That's the "See It Now"
11 program.

12 Q. What year was that?

13 A. "See it Now" program, '52 or '53. I have no
14 idea. I mean it's in the early '50s, let's put it
15 that way.

16 Q. And there they were saying, you recall in the
17 program, there's a debate about causation?

18 A. The program was, in fact, a debate.

19 Q. Okay. And did you see that go on in the
20 documents, or TV programs, or anything else that you
21 saw after the '50s, late '50s, '60s? '70s?

22 A. There was some -- I've seen some accounts of
23 scientific doubters, including Professor Berkson at
24 Mayo Clinic, at that time. But that's about the
25 extent of it.

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1 Q. That's not the question.

2 A. Okay.

3 Q. The question is: If in the course -- did you, in
4 the course of your historical analysis, determine
5 that tobacco companies and/or their industry
6 speaks people, late '50s, '60s, '70s, '80s, continued
7 to say, repeatedly, that there was an open question
8 about whether or not smoking caused cancer, and that
9 there was a debate about that? Did you see that in
10 your analysis?

11 A. I can't recall that specifically -- specifically
12 that kind of a -- no, statement. No. It may have
13 been. I may have seen it, but I don't recall it,
14 yes.

15 Q. You just don't recall it?

16 A. No, I don't.

17 I assume there may have been such a statement,
18 but I don't recall it.

19 Q. Do you recall what was said in the '94 testimony
20 by the executives in front of Congress on that issue?

21 A. Yes.

22 Q. What did they say?

23 A. Pardon me?

24 Q. What did they say?

25 A. No. I recall the newspaper accounts of that.

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1 Q. What did they say?

2 A. That they deny the addictive character of
3 cigarettes.

4 Q. Did they also deny that it caused cancer?

5 A. I don't recall that at all. That was not part
6 of -- my recollection does not include that. It was
7 the addiction question that I recall.

8 Q. You don't recall the causation of cancer?

9 A. No.

10 Q. Testimony in '94?

11 A. Testimony on cancer I don't recall, no.

12 If I'm not mistaken, the only clips that were
13 shown on the national news was the addiction clips.

14 Q. The -- when you read the complaint --

15 A. Uh-huh.

16 Q. -- you saw it alleged boldly and clearly that
17 tobacco companies and their industry spokes people
18 continued, from the '50s onward, to state publicly
19 that in fact nobody knew whether or not cigarette
20 smoking caused cancer? You saw that?

21 A. I saw that in the complaint, yes.

22 Q. And you did not ask any of those twenty-four
23 lawyers sitting around that big table in Chicago
24 whether you could just go with your research
25 assistants for one day into the Minnesota Repository

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1 to determine whether or not that statement was true?

2 A. That is correct. I didn't ask.

3 Q. We've already established that you and the
4 people of America and Minnesota, knew beyond a doubt,
5 beyond the mid '50s, that it causes cancer; correct?

6 A. By then the consensus of the opinion, both
7 scientific and others, was that it did, yes.

8 Q. And if, in fact, the tobacco companies, which
9 you're unaware of from your historical analysis, did
10 repeatedly state publicly that there was at minimum
11 an open question, and a scientific debate about it,
12 if in fact the record would bear that out, then
13 that's a lie, isn't it?

14 A. I have no way of knowing.

15 Q. No way of knowing?

16 A. No. Because I haven't seen that record.

17 Q. But I can ask you to assume, see.

18 A. Pardon?

19 Q. I can ask you to assume and that's okay because
20 you're an expert.

21 A. Historians don't assume.

22 Q. I understand, but you're an expert, okay? So I
23 can ask you to do that.

24 A. Historians don't assume. Individuals do.

25 Q. Fine. As an individual, sir, --

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1 A. Uh-huh.

2 Q. -- assume that documents would bear that out.

3 A. Yes.

4 Q. That tobacco companies and industry
5 speaks people continued to say for years publicly
6 that there was an open question about whether or not
7 smoking caused cancer. Assume that that's accurate
8 and borne out in the documents and it would be in
9 those documents, if you had looked. If that is what
10 they were saying publicly, that is a lie?

11 A. Define what you mean by a lie. If it's -- you
12 know, --

13 Q. It's a statement?

14 A. If there is still questions about -- if they
15 still have questions about the validity of the
16 findings, they can make that statement.

17 Q. Let's assume --

18 A. I don't have such --

19 Q. I understand you don't.

20 And let's assume further that they didn't. That
21 their internal documents say that not only do
22 Americans know, not only do Minnesotans know, but the
23 English know, and scientists the world over know, and
24 we know, but we're going to continue to say that
25 there's an open controversy. Assume that.

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1 A. Okay.

2 What do you want me to say about that?

3 Q. That would be a lie, wouldn't it?

4 A. Could very well be.

5 Q. Pursuant to your moral standard, that would be a
6 lie?

7 A. Yes, that would be.

8 Q. And if you, in the course of offering testimony
9 in this case, came in here and rendered an opinion,
10 or attempted to render an opinion on something, and
11 you could have and should have discovered the
12 documents on this question that I've just talked
13 about, but that you didn't, --

14 A. Uh-huh.

15 Q. -- and you offered testimony in a very narrow
16 area, or attempt to, then you also can be supporting
17 that lie?

18 A. Not true. In fact, an outright falsehood.

19 Q. We'll talk more about that. Because you told me
20 earlier that you would have the integrity, if you
21 determined that you were supporting a lie, to stand
22 up and say so; correct?

23 A. That is correct.

24 Q. And now, when you go to lunch are you going to
25 demand to see the documents --

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1 A. No.

2 Q. -- that I have stated exist?

3 A. No.

4 Q. Okay. Are you aware, sir, that nicotine in
5 cigarettes, the level of it, can be controlled up and
6 down?

7 A. I've seen such statements, allegations made,
8 yes.

9 Q. Are you aware of whether that's true or not?

10 A. Pardon me?

11 Q. Are you aware of --

12 A. I have no way of knowing that.

13 Q. You didn't do any historical analysis of that?

14 A. No. Not at all.

15 Q. Did you -- are you aware that without nicotine
16 that people would not be addicted and would very
17 likely not smoke and that cigarette companies are
18 aware of that and have stated that?

19 A. I'm aware and -- that it's been known
20 historically for many, many years that that is the
21 case. That nicotine was the agent that causes people
22 to be hooked to smoking and tobacco.

23 Q. Are you familiar, as a historian, of the concept
24 of cognitive dissidence, sir?

25 A. Cognitive dissidence? I think so.

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1 Q. What is it?

2 A. I can't define it, but I know what it means, I
3 think, you know.

4 Q. Have you looked at it in relationship to this
5 case and the issues in this case?

6 A. No.

7 Q. Have you looked at it in relationship to
8 rationalization or denial by smokers?

9 A. No.

10 Q. No idea, then, as to what cognitive dissidence
11 means in the context of the tobacco industry?

12 A. Not specifically, no.

13 Q. Are you, sir, familiar with studies in the
14 course of your historical analysis that report
15 that half of all smokers who undergo surgery for
16 lung cancer return to smoking?

17 A. I've not seen such a statement, but it wouldn't
18 surprise me.

19 Q. Well, did you ask your people to look at that
20 when they went to the Diehl Library?

21 A. No.

22 Q. Did you do a thorough review of the medical
23 literature when you went to the Diehl Library, from a
24 historical --

25 A. We did a thorough review of not the medical

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1 literature so much, as the public health literature.

2 Remember, that we are not practicing physicians or
3 scientists.

4 Q. All right. Nor are you trained as public health
5 people?

6 A. No. But the public health issue, at least, is a
7 kind of public issue that historians are concerned
8 with.

9 Q. Behind public health is science?

10 A. Yes.

11 Q. Intense science?

12 A. By all means.

13 Q. Huh?

14 A. By all means, yes.

15 Q. Yes.

16 Are you -- did you become familiar, as a public
17 health issue, there was a study in 1990 that said
18 84.3% of those people who smoke a pack or more of
19 cigarettes a day have tried unsuccessfully to reduce
20 the number of cigarettes they smoke?

21 A. I'm not familiar with that particular study, no.

22 Q. You didn't run across that in your public health
23 review?

24 A. No. We may have, but I don't recall it, yes.

25 Q. Did you find out what are the most advertised

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1 brands?

2 A. Pardon me?

3 Q. Did you find out what are the most advertised
4 brands when you did your historical analysis?

5 A. We did not, you know, measure the advertising
6 copy of each newspaper and see which brand had more
7 ads than others. No, we did not do that.

8 Q. Did you come to any understanding of that
9 through your review of -- whatever you review. Did
10 you review advertising ads?

11 A. We couldn't avoid it.

12 Q. Because they were all over the place?

13 A. Well, if we were looking through newspaper
14 materials, it's in the newspapers, yes.

15 Q. And so did you, or did your two researchers,
16 comment in any way about what their impression was
17 about what the most advertised brands were?

18 A. No.

19 Q. Didn't look at it?

20 A. Oh, we looked at it. But we had no impression
21 of what -- the most advertised brands, no.

22 Q. Did you come to any historical analysis of which
23 brands kids smoke more than others?

24 A. That was not the question that I was interested
25 in.

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1 Q. Have you looked at any correlation studies
2 between money spent on advertising and promotions?

3 A. No.

4 Q. And brands smoked?

5 A. No.

6 Q. It wasn't anything you were interested in
7 either; right?

8 A. No.

9 Q. You saw a lot of Joe Camel ads, I presume?

10 A. Yeah, I've seen quite a few, yes.

11 Q. You've seen them over time yourself?

12 A. Oh, of course. Of course.

13 Q. And based on historical analysis, and thinking
14 about awareness, surely it's your view that it would
15 be kids who would respond to these ads and think of
16 smoking positively; correct?

17 A. I have no idea. I assume so.

18 Q. You assume so as --

19 A. As an individual. Not as a historian.

20 Q. But also as an individual and historian and
21 somebody who is rendering -- attempting to render
22 opinions on awareness, --

23 A. Uh-huh.

24 Q. -- you would be aware, as a historian, --

25 A. Yes.

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1 Q. -- that a new, broad-based campaign, such as
2 Joe Camel, would create certain levels of awareness
3 in kids about the positive aspects of smoking; right?

4 A. I have no way of knowing that.

5 Q. You would assume that's accurate?

6 A. I assume.

7 Q. As an individual?

8 A. But I have no way of knowing that.

9 Q. You've not done any studies on that?

10 A. I've not done any studies on advertising and its
11 impacts, no.

12 Q. But what you have done is made conclusions about
13 the impacts of press articles?

14 A. Of what?

15 Q. Press articles.

16 A. More than press articles.

17 Q. Things --

18 A. Among other things.

19 Q. Things stated in the press, of things stated in
20 pamphlets, --

21 A. Uh-huh.

22 Q. -- of things stated in other places, you have
23 made conclusions about?

24 A. That's correct.

25 Q. The statements that are made in advertising

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1 billboards and/or promotional activities, may in fact
2 be more powerful than a Boy Scouts' pamphlet or a
3 press article; correct?

4 A. It could be, but I doubt it.

5 Q. It can be more powerful by way of color and
6 impact, and on and on; you understand that, right?

7 A. Yes. That could be.

8 Q. So when you make -- say that you assume that
9 advertising has an impact, that's the same assumption
10 that you have to make with respect to the historical
11 analysis?

12 A. No.

13 Q. Because that's what you're doing.

14 A. It's not.

15 Q. Because --

16 A. It's not. Quite different.

17 Q. Okay. Go right ahead and explain.

18 A. All right.

19 When I make the historical analysis it's based
20 on overwhelming evidence of all kinds, of which
21 advertising is a part.

22 And I have made no independent study of
23 advertising and its impact thereon.

24 Furthermore, the awareness of the health hazards
25 of smoking were so deeply engrained in the culture,

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1 that the advertising would have, I think, only
2 minimal impact, except in terms of perhaps cognitive
3 dissidence, if that's the point you wanted to make
4 before. But that's my -- my basic conclusion.

5 Q. That's your personal opinion?

6 A. My personal opinion.

7 Q. Because you just don't know?

8 A. Right. Exactly.

9 Q. Have you ever worked with an advertising
10 company?

11 A. No.

12 Q. Outside ad agency?

13 A. Never.

14 Q. Ever worked with any of the advertising
15 marketing experts at the University?

16 A. No.

17 Q. Are you aware, sir, that the cigarette
18 companies, all of them, actively pursue new smokers
19 in an attempt to continue to gain market share from
20 new, young, under-eighteen smokers?

21 A. Am I aware of that?

22 Q. Yes.

23 A. On the basis of my research?

24 Q. Yes, sir.

25 A. No, I'm not aware of that on the basis of my

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1 research.

2 Q. You saw it alleged in the complaint?

3 A. I saw it in the complaint, yes.

4 Q. You chose not to do any research on that topic?

5 A. That is correct.

6 Q. You could research that topic, couldn't you?

7 A. If it were part of my research agenda, right.

8 Q. Right. You could have said, based on this
9 complaint, "I'll research this issue about knowledge
10 of Minnesotans, about the health effects of smoking,
11 but I want to be fair here and I also want to
12 research what's alleged -- at least in part alleged
13 in this complaint, and one of the things that
14 disturbs me is that it's alleged that they go after
15 kids to hook them and get them. And I want to
16 research that just to be objective"; you could have
17 said that, couldn't you?

18 A. I could have, but I didn't.

19 Q. And you didn't?

20 A. And I wouldn't.

21 Q. And you wouldn't, would you?

22 A. No.

23 Q. Because you let someone else define the issue
24 that you research?

25 A. No.

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1 Q. Because when you reviewed the complaint you did
2 not add one additional research item to what was told
3 to you by Ellen Fitzgerald when she called you, did
4 you?

5 A. That is not true.

6 I did not add that to my research agenda for the
7 simple reason that I was not interested in what the
8 cigarette companies did. Period.

9 Q. And you felt it was acceptable for you, as an
10 academic, and as a professional, to not be
11 interested --

12 A. No.

13 Q. -- at all in the tobacco companies; right?

14 A. No.

15 The research question that I was following was,
16 in fact, public knowledge. And what the tobacco
17 companies did or did not do, did or did not reveal,
18 had a minimal bearing, at best, on that particular
19 question.

20 Q. You made that conclusion --

21 A. I made that conclusion.

22 Q. -- before knowing what they knew; right?

23 A. On the basis of my -- of my experience,
24 knowledge, as historian, my experience and knowledge
25 as an individual, over a long period of time, yes,

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1 sir.

2 Q. All right.

3 MR. PURVIS: Would this be a good time?

4 MR. MANNING: You name it. Any time is a fine
5 time.

6 (Luncheon recess taken.)

7 BY MR. MANNING:

8 Q. Professor Berman, I'm going to go back and pick
9 up your report and turn to page fourteen, where I'm
10 going to start.

11 It might be easier for you to take that clip
12 off.

13 MR. PURVIS: (Complying.)

14 THE WITNESS: Thank you.

15 THE WITNESS: And fourteen. Okay.

16 BY MR. MANNING:

17 Q. Now you see that you say here on the top of
18 fourteen, end the first -- not the first full
19 paragraph, you talk about "The passage of this bill
20 was the WCTU's longest lasting influence on cigarette
21 and health awareness in light of the fact that from
22 1887 to the present the state of Minnesota has
23 demanded that nearly every Minnesotan is schooled in
24 the hazards of cigarette smoking"; right?

25 A. That's right.

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1 Q. You agree that it's hazardous?

2 A. Yes.

3 Q. And that it has been hazardous since 1887?

4 A. Yes.

5 Q. And you have made no attempt to evaluate the
6 effectiveness of this educational program, have you?

7 A. No.

8 Q. You've not gone out and observed it?

9 A. No.

10 Q. You've not seen it in action?

11 A. No.

12 Q. You've not seen it over a period of time?

13 A. No.

14 Q. You've not seen anybody who was -- or talked to
15 anybody who says they were impacted by it?

16 A. No.

17 Q. You've seen no statistical evidence that it's
18 effective?

19 A. No.

20 Q. Nor have you seen anything about it other than
21 that it exists?

22 A. Oh, I've seen some of the text materials that we
23 used. I've seen some of the film clips that we use
24 and stuff like that, yes.

25 Q. You've seen things that tell you that it exists?

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1 A. Yes.

2 Q. All right. And you go down in your next
3 paragraph. You say, "The fact that these slang terms
4 were so widely used..." Do you see that?

5 A. Uh-huh.

6 Q. How do you know whether they were widely used?
7 That's a value judgment? That's a subjective
8 judgment, correct?

9 A. Based on, of course, an examination of the
10 cultural artifacts and literature of the time, yes.

11 Q. Specifically show me what you reviewed in your
12 report that showed you, as a historian, that those
13 terms were, as you say, so widely used?

14 A. It's found throughout the literature of the
15 time, both in the --

16 Q. Show them to me.

17 A. -- contemporary literature and the press.

18 Q. Show them to me. That's what I'm asking you.

19 A. I can't specifically show you.

20 Q. Those were in your six drawers, right?

21 A. I don't know if they're in the six drawers or
22 not. They're in the popular literature, in
23 Mark Twain's writings, and the writings of various
24 different authors of the time and so on.

25 Q. Did you count the number of times --

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1 A. No.

2 Q. -- that you saw the words "coffin nails" and
3 where they were used?

4 A. No, I have not counted.

5 Q. Did you count the number of times you saw the
6 words "cancer sticks," and where they were used, by
7 who, et cetera?

8 A. No, I haven't counted that.

9 Q. Did you count the number of times "little white
10 hearse plumes" were used? Had you ever heard that
11 before?

12 A. Oh, of course.

13 Q. I hadn't. But did you count that one?

14 A. Yes -- no, I haven't counted that one.

15 Q. Did you count "little white slavers"?

16 A. No.

17 Q. How many times that was used and when and over
18 what historical time?

19 A. Throughout the period that I've examined, I've
20 seen that term used.

21 Q. Right up until the '90s?

22 A. No. Up until the '30s, the '40s, and '50s.

23 Q. You, without counting, without being able to
24 identify the source, other than Mark Twain,
25 anybody -- any other sources besides Mark Twain?

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1 A. Numerous sources.

2 Q. But you can't tell me?

3 A. No, I can't because there's so many.

4 Q. But you can't tell me one, even though there's
5 so many, you can't tell this jury, other than
6 Mark Twain, one place that you, as the expert here,
7 self-proclaimed, can tell me where these were used?

8 A. Sure. Many places.

9 In the Minnesota White Ribbon. It periodically
10 appears in the White Ribbon.

11 It periodically appears in the journals of the
12 Women's Christian Temperance Union.

13 It periodically appears in the writings of -- of
14 Bernarr MacFadden.

15 It periodically appears in the writings of
16 Henry Ford.

17 It... It was used widely in the folk tales, folk
18 literature.

19 Q. Which ones?

20 A. All different kinds of folk tales and folk
21 literature that was widely spread throughout the time
22 and reported in the press, in magazines, things like
23 that. It's quite, quite widely used.

24 Q. The folk tales themselves were reported? Or the
25 fact that these words were being used in the

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1 folk tale was reported?

2 A. No. The folk tales themselves included these
3 words.

4 Q. So the fact that somebody may have reported on a
5 folk tale in the press doesn't mean that they
6 incorporated the words used in the folk tale, do
7 they?

8 A. Oh, I've seen some of the folk tales,
9 as well. I've read some of the folk tales.

10 Q. That's not what I'm asking.

11 A. Yes. Please ask the question again.

12 Q. You cannot identify one folk tale, besides
13 Mark Twain?

14 A. Mark Twain is not a folk tale.

15 Q. Well, then what are you saying is? Tell me
16 which ones are.

17 A. Folk tale? How to define it.

18 A folk tale is a popular tale that makes the
19 rounds of society that come out of the cultural
20 awareness and the cultural presence of a particular
21 moment in history.

22 Q. Published or not?

23 A. It could be published.

24 Q. It could not?

25 A. It could be. It could be oral tradition. Or it

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1 could be published, yes.

2 Q. But you've now identified for me the Minnesota

3 White Ribbon?

4 A. Uh-huh.

5 Q. What's that?

6 A. That is a publication that began in the 1890s
7 and continued through the 1950s out of -- if I'm not
8 mistaken, Moorhead, Minnesota, that was the
9 publication of one of the anti-tobacco groups.

10 Q. Do you have any idea how widespread a

11 publication that originated in Moorhead, Minnesota,
12 was by way of reaching all Minnesotans?

13 A. It was, of course, spread throughout Minnesota,
14 so far as I can tell, at the time --

15 Q. Do you ever any idea --

16 A. No, I have no idea of the extent of it, no.

17 Q. Correct.

18 Those are the dates.

19 The Temperance Union, --

20 A. The Women's Christian Temperance Union.

21 Q. Yes. What are their dates?

22 A. The Women's Christian Temperance Union -- 1870s,
23 approximately, to the 1950s or '60s.

24 Q. And how many people would read their
25 publications?

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1 A. They had a wide circulation.

2 Q. Yeah? All Minnesotans?

3 A. All over the country, including Minnesota.

4 Q. You made no determination to know how many
5 people in Minnesota read publications of the Women's
6 Christian Temperance Union?

7 A. I did not make that determination because I'm
8 not sure whether I could find such.

9 Q. So you have no idea?

10 A. Except it was widespread. That's all I know.

11 Q. You don't have any idea how many Minnesotans
12 read it?

13 A. No.

14 Q. MacFadden, what's that?

15 A. Bernarr MacFadden was an editor and publisher of
16 good health, of body-building kind of materials,
17 things of that nature. Very well known and very,
18 very popular in the inner war period.

19 Q. What years?

20 A. The inner war being World War I and
21 World War II?

22 Q. Okay. I to II?

23 A. Pardon me?

24 Q. I to II? World War I to World War II?

25 A. Yes.

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1 Q. Okay. Henry Ford, what were his dates?

2 A. Henry Ford, of course, was born in the late
3 nineteenth century, middle nineteenth century. Died
4 in the 1940s, I believe. Was, of course, well known
5 for his pioneering in the automobile industry. But,
6 in addition to that, he was very much involved in the
7 anti-tobacco --

8 Q. Right.

9 A. -- movement.

10 Q. Right.

11 A. And through the Dearborn Independent, which was
12 his publication that he put out in Dearborn,
13 Michigan, --

14 Q. Do you think that reached Minnesota?

15 A. Yes, I'm sure it reached Minnesota.

16 Q. Widely circulated here, too, and widely read?

17 A. I don't know how widely circulated, but it
18 reached Minnesota.

19 Q. You have no idea how many people read that in
20 Minnesota?

21 So, so far you've not identified for me, even
22 though you have opined in this report to a court of
23 law, the fact that these slang terms were so widely
24 used indicates a common knowledge -- there's not one
25 thing that you've indicated to me that goes beyond

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1 1950; correct?

2 A. I'm sorry.

3 Q. There is not one thing that you have indicated
4 to me, that this statement is based on, that goes
5 beyond 1950, is there?

6 A. I have seen these references more in the
7 literature prior to 1950 than I have since 1950. I
8 cannot tell you exactly, no.

9 Q. The only ones you've cited me, and I've asked
10 you to give me every one of them, are all prior to
11 1950. If you remember any others, tell me.

12 A. I don't recall any.

13 Q. Thank you.

14 And so the point is that you're willing to make
15 a bald statement here in this paragraph that, "The
16 fact that these slang terms were so widely used
17 indicates a common knowledge of the health risks and
18 addictive qualities of cigarettes."

19 A. Yes.

20 Q. Right?

21 A. Yes.

22 Q. And you're willing to say that as a historian
23 with no time limitation on it?

24 A. That is correct.

25 Q. Thank you.

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1 And in your view that goes right up till today?

2 A. That goes right up till today.

3 Q. Even though there may be all kinds of people who
4 have never heard of a little white hearse plume
5 before; right?

6 A. That is correct.

7 Q. Even though there's all kinds of people that may
8 not have heard of little white slavers?

9 A. That is right.

10 Q. So you as a historian think that that awareness
11 goes on even though those people who were living in
12 1950 might be dead?

13 A. Yes.

14 Q. Yeah. Okay.

15 And some of them might be dead from smoking
16 cigarettes; right?

17 A. That's possible.

18 Q. Little coffin nails, huh?

19 A. Yes.

20 Q. Yes.

21 A. As a matter of fact, coffin nails, now that I
22 recall, appeared in an editorial in the
23 Minneapolis Tribune dealing with the cigarette case.

24 Just recently. If I can't give you the exact date.

25 Q. The foundation for your opinion that these were

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1 widely used, and indicates a common knowledge, is
2 based on four publications and folk tales and
3 literature whose dates end in 1950, but for the
4 Minneapolis Star Trib editorial that you've
5 identified; correct?

6 A. That's correct. Among others.

7 Q. All right.

8 A. Remember, this is not an exercise in memory. I
9 can't recall everything I've seen.

10 Q. I understand that, sir.

11 But you do understand -- in all these ten
12 meetings that you had with these lawyers, you clearly
13 understood that any opinion that you attempted to
14 express in a court of law was to be supported?

15 A. Yes.

16 Q. Scientifically supported?

17 A. That is correct.

18 Q. From a historical perspective?

19 A. That is correct.

20 Q. Not anecdotally?

21 A. That is correct.

22 Q. Not just what you saw?

23 A. That is correct.

24 Q. And, once again, this such wide, common
25 knowledge -- now you're talking about America, now;

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1 right?

2 A. What reference is to that?

3 Q. "The fact that these slang terms were so widely
4 used indicates a common knowledge...?"

5 A. Oh yes.

6 Q. You're talking about the addictive qualities of
7 cigarettes, you're talking about America?

8 A. Yes.

9 Q. And, again, if anyone denied that common
10 knowledge of the addictive qualities and health risks
11 of cigarettes, they wouldn't be -- that wouldn't be
12 true, would it?

13 A. It wouldn't be believed.

14 Q. That's right. Because the truth, as you're
15 telling us historically, is that, one, they were
16 addictive, and, two, lots of people knew it?

17 A. Uh-huh.

18 Q. Right?

19 A. Yes.

20 Q. But clearly the first part of that, they were
21 addictive, is true, in your mind? And anybody who
22 would contradict that would be stating a falsehood?

23 A. First part of your question, yes.

24 Q. Then you go on to say, on page fifteen, in the
25 beginning, after you're talking about Goofy, you say

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1 there, in the middle, "Audiences laughed because they
2 were already aware of the lessons depicted"; right?

3 A. Uh-huh.

4 Q. As a historian, sir, don't you agree that you
5 cannot tell us why audiences laughed? You can't do
6 that? Come on.

7 A. Historical evidence can be used to make such
8 conclusions.

9 Q. Let's keep at it.

10 A. Uh-huh.

11 Q. Do you think your credibility would be more
12 enhanced in this litigation if you withdrew that
13 statement, or are you going to stick by it?

14 A. I'll stick by it.

15 Q. You're going to stick by that you, Hyman Berman,
16 as a historian at the University of Minnesota, are
17 willing to state, under oath, --

18 What year -- what year were these audiences
19 laughing?

20 A. The Goofy cartoon?

21 Q. Yeah.

22 A. If I'm not mistaken, that was early '50s.

23 Q. Did you see the cartoon?

24 A. Yes, I did.

25 Q. You watched it?

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1 A. Yes, I did.

2 Q. Out of those Vanderbilt archives?

3 A. I don't recall where I got the copy of it.

4 Q. Did you laugh?

5 A. I was too busy analyzing it to laugh.

6 Q. Was it funny?

7 A. Yes.

8 Q. What was funny about it?

9 A. What was funny was the impossible and almost
10 un- -- the -- well, the impossible way it was to
11 break the habit.

12 Q. Because he was addicted?

13 A. Because he was addicted.

14 Q. And he runs around and he goes so far as to try
15 to cut off his arm?

16 A. That's right.

17 Q. To quit?

18 A. That's right.

19 Q. Because even at that time you were aware there
20 were people who would have their entire larynx and
21 esophagus taken out and they'd still find a way to
22 smoke; right?

23 A. That's right.

24 Q. And that's not funny, is it?

25 A. Not funny at all.

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1 Q. And it's not funny if you really did cut your
2 arm off to try to quit smoking, if you were that
3 desperate; right?

4 A. Not at all. That's correct.

5 Q. And you've even seen historical accounts where
6 some people even say that they're almost willing to
7 go that far, they're so desperate, they want to quit
8 smoking and can't; right?

9 A. I haven't seen such accounts, but I'm sure that
10 they exist.

11 Q. Right.

12 And, in fact, the reason that people laugh is
13 not because they're aware of something. They laugh
14 because rather than cry at the horror of what they're
15 looking at, something is being made fun of the
16 horror; right? You'd agree with that?

17 A. I think so, yes.

18 Q. You'd agree with that?

19 A. Yeah.

20 Q. Sure. So that's as plausible a reason as to why
21 people laughed, as they laughed, because they were
22 already aware of the lessons depicted?

23 A. What you're saying is essentially what I am
24 saying.

25 Q. Yeah.

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1 Except part of the charge that you had in the
2 way the question was defined to you by Ellen
3 Fitzgerald, via the lawyers from the tobacco
4 industry, was to do the historical analysis and take
5 a look at awareness, wasn't it?

6 A. No.

7 Q. Okay. Tell me.

8 A. The question was: Would I do research on the
9 topic of when and how the Minnesotans -- whether,
10 when, and how Minnesotans were aware of the health
11 hazards of smoking. That was the original
12 formulation.

13 Q. Whether, when, and how --

14 A. Yeah.

15 Q. -- knowledge of health risks of smoking?

16 A. Right.

17 Q. Right?

18 A. Right.

19 Q. And one of those ways that you told me is that
20 you would look at how people became aware of --

21 A. Yes.

22 Q. -- the health risks of smoking?

23 A. Uh-huh.

24 Q. And you understood that early on in your
25 question, your issue, your definition, --

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1 A. Yes.

2 Q. -- that awareness was a word you were thinking
3 about?

4 A. Yes.

5 Q. Yeah. And so in your historical protocol, when
6 you wrote your report and you watched Goofy running
7 around, being willing to cut off his right arm, you
8 concluded, empirically, that audiences laughed
9 because they were already aware of the lessons
10 learned; correct?

11 A. Yes.

12 Q. And then you went on and you cite to us,
13 Tex William's song. Did you listen to it?

14 A. Yes, I've heard that song.

15 Q. Back then or recently?

16 A. Back then. I don't know if I've listened to it
17 recently. But I recall it from back then.

18 Q. Did it make fun of cigarette smoking?

19 A. I don't think it made fun of cigarette smoking.

20 It was, in fact, a kind of statement of the
21 ubiquitous nature and the difficulty of breaking the
22 habit, yes.

23 Q. Yeah.

24 A. I don't think it was funny in that sense, no.

25 Q. Did you become aware that, in fact, that song

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1 supported the smoking habit?

2 A. Pardon me?

3 Q. Did it support the smoking habit?

4 A. No.

5 Q. It just showed how difficult it was to quit?

6 A. Yes.

7 Q. In your view?

8 A. Yes.

9 Q. What was it? You note it here. What does it
10 do? This coverage was not limited to film, you say,
11 but extended to all forms of media.

12 A. Uh-huh.

13 I'm sorry?

14 Q. Do you think -- do you think the song helped
15 tell people that cigarettes cause cancer? Is that
16 what you think it did?

17 A. Well, it certainly gave the impression that it
18 was not something good for them, yes.

19 Q. Did it in any way glamorize smoking?

20 A. No.

21 Q. Did it promote it in any way in your view?

22 A. No.

23 Q. Absolutely not?

24 A. No.

25 Q. Impossible?

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1 A. Right.

2 Q. And that's your view?

3 A. That's my view.

4 Q. Okay. You then say on page sixteen on the
5 bottom of the first paragraph there, "In one stroke
6 this pamphlet integrated the anti-tobacco arguments
7 of health, morals, and ethics"; correct?

8 A. I am sorry.

9 Dealing with what? The first paragraph?

10 Q. The last line of the first paragraph.

11 A. Oh, dealing with Professor Zellany's pamphlet.

12 Q. Correct.

13 A. Okay. I want to put it in context, so I know
14 what you mean. Yes. Okay.

15 Q. And this is a pamphlet he's writing on race
16 deterioration; is that right?

17 A. That is correct.

18 Q. This pamphlet integrated the arguments of
19 health, morals, and ethics?

20 A. That's correct.

21 Q. And you agree that those arguments exist?

22 A. They did exist, yes.

23 Q. And still do?

24 A. Still do.

25 Q. Health, morality, and ethics?

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1 A. Yes.

2 Q. Related to smoking; correct?

3 A. Yes.

4 Q. Do you know how wide this article was published?

5 A. It was widely disseminated within Minnesota.

6 How widely it was disseminated outside, I do not
7 know.

8 Q. Now, then, you go on, on the bottom there,
9 Dr. Moses Barron at the U of M, he brings all his
10 students in to show them an autopsy of a lung
11 cadaver; right?

12 A. Yes.

13 Q. And it was cancerous?

14 A. Yes.

15 Q. And physicians are condemning the habit, right?

16 A. Uh-huh.

17 Q. And are you aware of whether or not the tobacco
18 companies did any research to look at cadaverous
19 cancerous lungs?

20 A. I have no knowledge of that.

21 Q. None?

22 A. None.

23 Q. Did you ask anybody about that?

24 A. No.

25 Q. Never asked?

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1 A. No.

2 Q. Just this one guy here at the University of
3 Minnesota, if he did it, then your view is there's
4 some enhanced awareness with those medical students
5 on the part of the state of Minnesota; is that right?

6 A. Yes. Yes.

7 Q. And the reason there's enhanced knowledge on the
8 part of the state of Minnesota is there was some
9 medical students that went in and looked at that
10 cadaverous cancerous lung in the 1920s; and so your
11 view is, because those Minnesotans looked at that
12 cadaver, in this lawsuit the state of Minnesota has
13 enhanced knowledge about cancer?

14 A. Not only about that, but that was one factor,
15 yes.

16 Q. What else does it have knowledge about about
17 cancer?

18 A. Oh certainly, what -- we're dealing here with
19 the first evidence of a cancerous lung uncovered by a
20 medical practitioner in the state of Minnesota,
21 Dr. Moses Barron.

22 Q. How do you know that?

23 A. The literature tells me that.

24 Q. Do you know when the first cadaverous cancerous
25 lung was uncovered by the tobacco industry?

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1 A. No, I have no idea.

2 Q. Did you ask them?

3 A. No.

4 Q. No interest -- again, just not interested in
5 their knowledge about that?

6 A. That is not my research design.

7 Q. You're right.

8 By your design?

9 A. By my design.

10 Q. And then you make that statement there, "By the
11 '50s cigarette smoking was increasingly
12 scientifically linked as a cause of specific
13 diseases, and the scientific community focused on the
14 specific health hazards of smoking on the heart,
15 lungs, and other vital organs"; right?

16 A. Yes.

17 Q. You go down in the next paragraph. "After the
18 '50s, additional concrete examples of smoking and
19 heart disease, larynx cancer, and lung cancer were
20 brought to public light through scientific research
21 and such research was published in the national and
22 local Minnesota press"; correct?

23 A. That is correct.

24 Q. "Scientific coverage reached well beyond the
25 print media, however, and was reported through

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1 broadcast journalism and reports as well"; right?

2 A. Yes.

3 Q. Therefore, if you, as a manufacturer, had
4 knowledge not only of this, of what is occurring
5 publicly, but you have your own scientific knowledge
6 that all of this is true, what you just said, which I
7 won't repeat, but causes cancer, heart disease,
8 et cetera, then to deny it is wrong?

9 A. That's a hypothetical question. But, of course,
10 I'd answer it in terms of my view as an individual,
11 not a historian.

12 Q. Yes.

13 A. That is, of course, it's wrong.

14 Q. Of course it's wrong?

15 A. Of course. If the premise of your question is
16 correct.

17 Q. And the reason that it's a hypothetical, is that
18 you have never looked at what the tobacco companies
19 knew in order to not make it a hypothetical?

20 A. That's correct.

21 Q. So there's certain things when you walk in here
22 today, you're kind of smart?

23 A. No.

24 Q. And there's a lot of things in here when you
25 walk in today that you just don't know?

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1 A. Oh, the question has to do with the tobacco
2 companies' materials.

3 Q. Right.

4 A. I was not -- that was not my interest to do
5 research in the tobacco industry.

6 Q. Do you think it is ethical on the part of a
7 professor, at any institution, let alone a public
8 institution as great as the University of Minnesota,
9 but do you think it's ethical on the part of any
10 academic, anywhere in America, to take a look in a
11 lawsuit that involves two sides -- it was clear to
12 you that there were two sides; right?

13 A. (Nodding.)

14 Q. You saw the title?

15 A. Yes.

16 Q. And narrow your research question so that it, by
17 design, can only involve one, narrow aspect of one?

18 MR. PURVIS: Object to the form of the
19 question.

20 BY MR. MANNING:

21 Q. Do you think that's ethical?

22 A. I have no idea what you're driving at.

23 Q. I'm asking you --

24 A. The question I was researching had to do with
25 the public awareness, not the cigarette companies'

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1 attitudes and actions. That's for someone else to do
2 research on. Not for me.

3 Q. And that's what I'm asking is you.

4 A. Is it ethical? Yes.

5 Q. You believe it's ethical?

6 A. Certainly. And meets with the standards of
7 historical scholarship as defined by the profession.

8 Q. Where is the profession defined, that when you
9 come into a lawsuit and there's two sides, that you
10 can define an issue so narrowly that you will never
11 look at the behavior or conduct of one group of
12 entities? Where in the profession is that defined?

13 A. I challenge your statement about narrow
14 definition. This is not a narrow definition. This
15 is a definition of what the people of Minnesota knew,
16 when they knew it, how they knew it. What the state
17 knew, when it knew it, and what it did about it.

18 That is the broadest definition I could think of.

19 If you in your narrow view want to bring in the
20 tobacco companies, please do so. That's not my
21 research design.

22 Q. By design --

23 A. Some other historian may want to do that. That
24 is not my research design.

25 Q. And you do know that there were people working

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1 for the tobacco companies in Minnesota?

2 A. By working for them you mean there were tobacco
3 merchants? Yes. I knew that.

4 Q. Residents who worked for the tobacco companies
5 who lived in Minnesota?

6 A. I assume so. I don't know that for a fact.

7 Q. You don't know that?

8 A. Not for a fact, no.

9 Q. All right.

10 A. But I assume that there are.

11 Q. And they would be Minnesotans, too?

12 A. Yes.

13 Q. And they might have some special knowledge about
14 this issue that you've defined by design; right?

15 A. I have no way of knowing that.

16 Q. I understand.

17 You didn't define that into your question
18 either, did you?

19 A. Individuals? No, I never defined individuals.

20 Q. You then say on page eighteen, top sentence,
21 "The Hennepin County chapter of the American Cancer
22 Society also produced a color film strip for children
23 that unambiguously linked smoking and terminal
24 diseases."

25 A. That is correct.

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1 Q. What year was that?

2 A. That was in 1961 or '62. It was prior to the --
3 the surgeon general's report of '64.

4 Q. So prior to the surgeon general's report there
5 was at least a document here that in your
6 characterization unambiguously linked smoking and
7 terminal diseases such as cancer?

8 A. Yes.

9 Q. And, once again, if the entities who made those
10 very products, denied that unambiguous link, that
11 would be false, wouldn't it?

12 A. Sorry?

13 Q. That would be false?

14 A. You would have to ask them.

15 Q. And you didn't ask them?

16 A. No.

17 Q. All you know is that there was an unambiguous
18 link between smoking and terminal diseases that was
19 abundantly clear in your view?

20 A. That's correct.

21 Q. And if someone was denying that, they would be
22 wrong? Because culture had adopted it in your view;
23 correct?

24 A. The American Cancer Society, Hennepin County
25 branch, had adopted it and it was used widely in

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1 schools, yes.

2 Q. So if anybody, I don't care who it is, disagreed
3 with it -- if my next-door neighbor said, "They must
4 be wrong. I'm just going to continue to smoke," he
5 would be wrong? That was an unambiguous link?

6 A. Yes.

7 Q. Right?

8 A. (Nodding.)

9 Q. And if the tobacco companies put out anything to
10 support my next-door neighbor in his belief, that the
11 link was ambiguous, and it wasn't unambiguous, if
12 they supported that, and tried to, and had meetings
13 about how to, then that would be wrong, wouldn't it?

14 A. Yes, it would be. Speaking now as an
15 individual, not as a historian.

16 Q. Now -- and then on page twenty, sir.

17 A. Sorry?

18 Q. Page twenty.

19 A. Twenty?

20 Q. "A year after the surgeon general's report on
21 smoking was published in 1964..."

22 A. Yeah, I got it.

23 Q. Thank you.

24 "...the Minnesota Department of Education
25 updated the curriculum by adding additional language

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1 stating that tobacco is the 'primary cause of lung
2 and laryngeal cancer"'; correct?

3 A. Yes. That's correct.

4 Q. And you don't disagree with that?

5 A. Pardon me?

6 Q. And you don't disagree with that?

7 A. Oh no.

8 Q. And, again, in your view, the Department of
9 Education was only doing what was proper by calling
10 this the primary cause; right?

11 A. I believe so, yes.

12 Q. And if anyone continues now, after 1964, after
13 all the scientific studies come out in the '50s, and
14 after the surgeon general pronounces in '64, and
15 after the Minnesota Department of Education refers to
16 it as, quote, "primary cause," end quote, if anyone
17 would continue to do anything to put out information
18 to suggest that it wasn't the primary cause, that
19 would be wrong, wouldn't it?

20 A. I assume so, yes.

21 Q. Now, let's go to twenty-one here.

22 A. Twenty-one?

23 Q. Please.

24 A. Uh-huh.

25 Q. You say in your paragraph, "Based on another

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1 poll, the Minneapolis Tribune reported in '64 and
2 again in '65 that 80% of all Minnesotans believe
3 cigarettes to be a hazard to health, which was called
4 a phenomenal figure in polling annals.

5 Comparatively, less than 60% of freshmen knew when
6 the Civil War was fought, who the American
7 President..." et cetera.

8 A. Right.

9 Q. Now, do you know what the cigarette companies
10 were doing in 1964 and '65 by way of marketing and
11 responding to this issue?

12 A. No.

13 Q. No idea?

14 A. No idea.

15 Q. Do you have any idea when filtered cigarettes
16 were introduced?

17 A. I believe in the 1950s.

18 Q. Do you have any idea when Kent was introduced
19 and took a huge upsurge?

20 A. Yes. That was probably the late '50s and into
21 the '60s, yes.

22 Q. Right around this time, you'd say?

23 A. About -- around this time, yes.

24 Q. Are you aware of whether or not the tobacco
25 companies attempted to respond to the health scare of

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1 cigarettes at all?

2 A. I'm aware of the fact that they started

3 introducing low tar and nicotine cigarettes as a

4 response to the health scare, yes.

5 Q. What are you aware of about that?

6 A. Well, the historical record from the newspaper

7 accounts, journal accounts, articles, and so on, tell

8 of the widespread introduction of new brands -- brand

9 names -- not brand names -- but brand names that were

10 put forward as low tar and low nicotine cigarettes.

11 Q. Uh-huh. And was that directly in response to

12 the health scare, do you know?

13 A. I don't know.

14 Q. You don't know?

15 A. I assume so.

16 Q. You assume so?

17 A. I assume so, but I don't know for a fact.

18 Q. You never looked at the documents and you never

19 talked to anybody in the tobacco company, so you

20 wouldn't know?

21 A. No.

22 Q. All you know is that there was filtered

23 cigarettes. There were filtered cigarettes being

24 introduced about this time?

25 A. Yes.

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1 Q. Do you have any idea whether they were
2 successful?

3 A. I have no idea what level of success they
4 reached.

5 Q. Do you have any idea what impact they had on the
6 American consumer and their knowledge about smoking
7 and cancer and addiction?

8 A. It reenforced their knowledge of the health
9 hazards of smoking.

10 Q. That's your view?

11 A. Yes.

12 Q. That the filter cigarette -- make sure I
13 understand that. Your view of the filtered cigarette
14 introduction was that it reenforced the American
15 people's attitude about cigarette smoking being
16 unhealthy?

17 A. Yes.

18 Q. Did it in any way promote smoking because it was
19 now much less dangerous and impacted health far less
20 because there were filters that were taking out tar
21 and other negative things?

22 A. It could have.

23 Q. Did it?

24 A. I don't recall the exact figures of the
25 cigarette production from year-to-year at that time.

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1 But it could have.

2 Q. But you don't know?

3 A. I don't know.

4 Q. So if it did, then in fact the introduction of
5 filtered cigarettes may have had the opposite
6 effect? In other words, it may have had the effect
7 that people believed they were safe, as opposed to
8 people thinking cigarette smoking was harmful,
9 particularly if it was advertised as safe; wouldn't
10 you agree?

11 A. It could.

12 Q. But you didn't look at that, did you?

13 A. Well, I saw the specifics on this in the various
14 documents that I looked at. But in terms of its
15 impact on cigarette consumption, no.

16 Q. But if the tobacco companies were studying, not
17 only the impact of filtered cigarettes on
18 consumption, but if they were also studying impact of
19 the advertising and the way they introduced a new
20 product, a new filter cigarette, in order to continue
21 to have people smoke, retain market share, and on and
22 on, the only way to know that would be to talk to the
23 tobacco companies, wouldn't it?

24 A. If that were my research project, yes.

25 Q. Wouldn't be in the public domain, would it?

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1 A. Pardon?

2 Q. It wouldn't be in the public domain?

3 A. About advertising and the impact?

4 Q. Correct.

5 A. I have no idea where that would be.

6 Q. And you don't have any idea whether it would be
7 in the tobacco company documents?

8 A. No.

9 Q. You never asked?

10 A. Pardon me?

11 Q. You never asked?

12 A. No.

13 Q. Have you ever heard of free nicotine?

14 A. Sorry?

15 Q. Have you ever heard of free nicotine?

16 A. Free nicotine?

17 Q. Yeah.

18 A. I have some vague recollection of hearing that,
19 but I have no idea what that means at the present
20 moment.

21 Q. What is it?

22 A. Huh?

23 Q. What is your vague recollection?

24 A. I have a vague recollection of seeing that in
25 connection with some kind of report about cigarettes

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1 and nicotine. I have no idea what it means, frankly.

2 Q. So in your historical analysis, again, you have
3 no idea about the issue of free nicotine and what
4 cigarette companies were doing to pH levels in
5 cigarettes to impact nicotine addiction levels or
6 anything else?

7 A. I am not an expert in science, technology,
8 medicine, or any of these areas. So I wouldn't
9 know. I wouldn't know how to evaluate it.

10 Q. So if there's one or ten Minnesotans out there
11 who you think in 1970 are aware of health hazards,
12 let's say, of smoking, okay? Let's assume that. You
13 think a lot of Minnesotans were aware of it, right?

14 A. In the 1970s?

15 Q. Yeah.

16 A. Yes.

17 Q. But you have no idea how many of those
18 Minnesotans who may be smokers, one who were
19 addicted; right?

20 A. Pardon?

21 Q. One, who were addicted? You have no idea how
22 many were?

23 A. No.

24 Q. You have no idea how many were being manipulated
25 with nicotine levels that weren't disclosed to them

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1 to enhance their addiction, do you?

2 A. I have no idea of that, no.

3 Q. Then on page twenty-three there was an

4 interesting little D-Day activity in 1985 --

5 A. Yeah.

6 Q. -- that you took particular note of, where the

7 Minnesota press reported on a mock trial finding and

8 said, quote, "The tobacco industry guilty of killing

9 three hundred fifty thousand Americans a year"?

10 A. Annually.

11 Q. Annually. That means a year, right?

12 A. Uh-huh.

13 Q. And "The Tobacco Mafia guilty of costing the

14 country billions of dollars in health-care costs,

15 loss of productivity in the work place, and property

16 damage from fires"; right?

17 A. Yes. That's correct.

18 Q. That was quoted in the St. Paul Pioneer Press,

19 correct?

20 A. That is correct.

21 Q. Do you know how many Americans every year die

22 from smoking cigarettes?

23 A. I assume that figure of three hundred fifty

24 thousand is accurate.

25 Q. As a historian do you think that the level of

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1 awareness of the American people would change if
2 executives, CEOs of five tobacco companies stood up
3 together and stated that we must tell you that we
4 have known and know today that our product is in fact
5 causing three hundred fifty thousand deaths a year
6 and we together must do something to stop this? Do
7 you think it would have some impact?

8 A. Would that have changed the awareness you
9 asked?

10 Q. Would it have -- that's right. Would an
11 announcement by those five people be a different
12 level -- connote a different level of awareness than
13 something else?

14 A. As far as I can say -- see, the knowledge of the
15 health hazards of smoking were so widely known that
16 this would not have added very much to the total
17 awareness package.

18 Q. Okay. So that's your view; is that if in fact
19 the tobacco companies would have stood up and the
20 executives themselves would have said exactly what
21 was going on, as I've just described, in a very
22 public way, in your view, and if they said, "And,
23 kids, stop. Stop, kids, because it's going to kill
24 you. One way or the other, it's going to get you,
25 whether it's cancer of the lungs, heart disease, or

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1 whatever. Don't get addicted. And we're not going
2 to advertise any more to kids." You don't think that
3 would have impacted the level of awareness in
4 Minnesota?

5 MR. PURVIS: Object to the form.

6 BY MR. MANNING:

7 Q. Correct?

8 A. I don't think it would have had that much of an
9 impact.

10 Q. Okay. And you've not done anything to determine
11 that, have you?

12 A. No.

13 Q. When you're -- as a person that's dealing with
14 awareness, do you make qualitative value judgments on
15 how much something will impact a degree of awareness
16 versus something else?

17 A. One has to make qualitative judgments. And I
18 mean that's part of the -- part of the process of
19 research, one makes qualitative judgments.

20 Q. Right. Right.

21 And you've just made one by stating that you
22 don't think it would make much difference, do you?

23 A. When I use the term qualitative judgments I'm
24 talking in terms of the degree of credibility of a
25 particular source, rather than a statement of this

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1 kind.

2 Q. Do you believe that the credibility of the
3 source in this instance, if it were the CEO of a
4 tobacco company, let's say Philip Morris, just to
5 pick one as an example, but illustrative of all the
6 others, standing and stating unequivocally for ten or
7 fifteen minutes what the historical facts are, and
8 what he knows, and what his scientists have known,
9 and what his company has known, and what must happen
10 to save lives, to save our children's lives, do you
11 believe that that would have no greater impact than
12 any other source communicating the same information?

13 A. This did not happen; therefore, I cannot comment
14 on something that did not happen. This history is
15 the -- is the art of discussing what occurred, not
16 what might have occurred, or what should have
17 occurred. I may agree with you that this should have
18 happened. But I can't comment upon that as a
19 historical fact.

20 Q. Should it have happened?

21 A. I think it should have happened perhaps.

22 Q. Should --

23 A. But I'm talking now as an individual.

24 Q. That's fine. That's fine.

25 Why should it have happened in your view?

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1 A. It may have been the right thing to do.

2 Q. And would, if it had happened, taking the
3 hypothetical, which you're allowed to do in this
4 court, that in fact would have a greater impact,
5 particularly if done repeatedly, and the message was
6 sent very clearly, would have a greater impact than
7 the Women's Christian Temperance League or the
8 Boy Scouts of America, right, as an example?

9 A. Let me answer your question this way: Not in
10 the hypothetical, but in the actual. That is to say,
11 since they didn't do, then the question is to what
12 degree is that a credible source in this particular
13 case? As against the American Cancer Society, the
14 American Lung Society, the Red Cross, et cetera,
15 et cetera. My answer to that, would be that it is
16 not a credible source.

17 Q. Why is it not a credible source?

18 A. The people didn't think it was a credible
19 source.

20 Q. Who didn't think it was a credible source? The
21 people did not think the tobacco companies were a
22 credible source?

23 A. That's correct.

24 Q. How do you know that?

25 A. All of the material regarding health awareness

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1 that is generated by the various organizations I
2 mentioned previously are available in public
3 depositories--Wilson Library, Walter Library at the
4 University, et cetera. None of the tobacco company
5 materials are to be found there.

6 Q. Uh-huh. I understand that.

7 A. Uh-huh.

8 MR. MANNING: Read back the question, please,
9 prior to.

10 (Record read.)

11 MR. MANNING: Thank you.

12 BY MR. MANNING:

13 Q. New question. New -- let me ask a new question
14 for the record.

15 A. Okay. Sure.

16 Q. In fact, sir, if the tobacco companies and
17 executives had come forward, it would have been
18 shocking because it would have been different than
19 their public statements before; correct?

20 A. If -- yes.

21 Q. Second, it would have had a huge awareness
22 factor because it was the manufacturer itself who has
23 the most knowledge about its product, saying
24 something to the consumer that was not necessarily in
25 the best interest of profits, but in the best

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1 interests of the people; right?

2 A. That didn't happen, though.

3 Q. That didn't happen, did it?

4 A. No.

5 Q. And we've agreed that it should have, right?

6 A. Speaking as a person, --

7 Q. Right.

8 A. -- an individual. Not as a historian.

9 Q. I understand.

10 And if it had -- and you watch lots of
11 historical events. We've just seen some dramatic and
12 tragic deaths, and all kinds of things that we watch
13 in our society, we watch their impact and awareness,
14 on and on, but if they had stood together, those
15 executives, and made that announcement that we're
16 talking about, "This product kills and we've got to
17 stop it. We've got to really stop it? We've got to
18 do that together, because it's in all of your best
19 interests"; that, in fact, would have had, in your
20 view as a historian, a dramatically greater impact
21 than the American Cancer Society or some other entity
22 pronouncing that cigarette smoking causes cancer,
23 would it not?

24 A. I have no way of evaluating a hypothetical

25 question like that. It could have, yes.

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1 Q. Thank you.

2 Now, on page twenty-eight, if I can direct you

3 to --

4 A. Twenty-eight?

5 Q. Yes, sir. Please. To the paragraph that begins

6 with "although."

7 A. Although, yes.

8 Q. There you say there was this law passed in 1913,

9 right?

10 A. 1913 is a repeal of a law.

11 Q. Right. And the reason for its repeal was it was

12 ineffective enforcement and lack of compliance with

13 the law, right?

14 A. That is correct.

15 Q. And the legislature recognized that; correct?

16 A. That is correct.

17 Q. So now at least we'll read that in 1913 smoking

18 in Minnesota was no longer illegal?

19 A. That is correct, yes.

20 Q. There was an explicit approval of it, so to

21 speak?

22 A. Oh, I wouldn't say repealing a prohibition is

23 approval. But if you want to characterize it that

24 way, go ahead.

25 Q. I understand. I understand what you're saying.

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1 Now, --

2 A. Approval by the state.

3 Q. Now, we go to twenty-nine, okay? Bottom
4 paragraph.

5 "Unlike the first anti-cigarette statute, the
6 1919 law," now the next law passed?

7 A. Uh-huh.

8 Q. -- "...recognized that to curtail smoking the
9 state must first discourage smoking among its youth";
10 right?

11 A. That's correct.

12 Q. And so Minnesota was now sending a message that
13 its kids shouldn't be targeted?

14 A. That wasn't the first time.

15 Q. And it wasn't the first time?

16 A. No.

17 Q. And the tobacco companies, you're confident,
18 were aware of that, because they'd be aware of the
19 laws that impact their industry?

20 A. I would assume so, yes.

21 Q. Yeah. Do you know whether they had lobbyists as
22 early as the '20s here?

23 A. I have no idea.

24 Q. You never asked that question?

25 A. No.

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1 Q. You don't know when the first time was that they
2 had lobbyists?

3 A. I have no idea. I have no idea when the first
4 lobbyists appeared in the Minnesota State Legislature
5 for anything.

6 Q. Right.

7 A. But we could find that out.

8 Q. Sure.

9 But at least we know that a message was sent
10 here, by Minnesota, not to target kids in Minnesota?

11 A. That message had been sent even earlier, as I
12 said before.

13 Q. So to the extent a company was doing that,
14 targeting kids in Minnesota, it would be contrary to
15 the message that had previously been sent, let alone
16 sent again in 1919; right?

17 A. Yes.

18 Q. And so if they were doing that, targeting kids,
19 and really doing things to do that, it would be
20 contrary to law?

21 A. Yes.

22 Q. Then you go on, on page thirty, to spell out
23 what the penalty for any violation of a minor's use
24 was, if a minor were to be convicted of smoking, he
25 faced a fine. On and on, right?

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1 A. Yes. Right.

2 Q. Further details sending this message to anybody,
3 including the tobacco companies, that they shouldn't
4 target kids; right?

5 A. Yes.

6 Q. You have something very interesting at the
7 bottom of page thirty-one. I just wonder if you
8 found it interesting.

9 A. Uh-huh.

10 Q. It says, "While 41% of adults polled by
11 Fortune Magazine said they smoked cigarettes in '39,
12 76% said they smoke now in response to a similar
13 Gallup Poll in '46"; right?

14 A. That is correct.

15 Q. And this was a significant increase, from 41 to
16 76; right?

17 A. Tremendous increase.

18 Q. And do you know what accounted for that?

19 A. Yes.

20 Q. What?

21 A. World War II.

22 Q. Also the fact that women were smoking?

23 A. No.

24 Q. More than they had in the past?

25 A. Probably the peak of women smoking cigarettes --

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1 peaked -- started going up in the 1920s and into the
2 1930s. Probably in the 1940s, if I recall my sources
3 well enough, the rise in the proportion of women
4 smoking kept pace with the rise in proportion of the
5 total population smoking. It didn't exceed the rise
6 in the total population.

7 Q. Okay. So the rise, though, in women smoking,
8 was also dramatic by some percentage, whether it was
9 41 to 76, it was at least an upsurge?

10 A. Yes.

11 Q. Commensurate with the rest of the population?

12 A. Yes.

13 Q. And you then say, "Notably, this increase
14 occurred even though the majority of those polled
15 said they thought cigarette smoking was harmful"?

16 A. That is correct. That's at least what the
17 Gallup Poll reports.

18 Q. Does that statement there, to you, say something
19 about the power of addiction?

20 A. Well, I don't know what it tells me. Among
21 other things, it tells me some thing about the power
22 of addiction, yes.

23 Q. What are the other things it tells me?

24 A. Well, the other things it tells me are, of
25 course, the tensions of World War II times were such

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1 that people found release, relief, whatever you want
2 to call it, from a -- what turns out to be a harmful
3 habit.

4 Q. You then say at the bottom of page thirty-three,
5 if I can.

6 A. Thirty-three? Yes, sir.

7 Q. Last sentence here, you're talking about from
8 '55 to '75?

9 A. '57.

10 Q. Yeah. "In '57 it proposed the establishment of
11 'no smoking' areas in hospitals..." --

12 A. Uh-huh.

13 Q. -- "...because of the health risks of smoking"?

14 A. Right.

15 Q. You then say, "That bill did not pass..." --

16 A. Uh-huh.

17 Q. -- "...because most of the physicians in the
18 state and the State Department of Health itself
19 opposed its passage."

20 A. Yes.

21 Q. You don't cite to anything there, do you?

22 A. If I'm not mistaken, it came out of the Senate
23 Committee Hearings.

24 Q. But in fact, sir, you didn't evaluate what
25 activities the tobacco companies were up to at that

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1 time, --

2 A. No.

3 Q. -- on that bill, in Minnesota, to determine
4 whether they had an impact on that bill not passing?

5 A. No, I did not.

6 Q. So at least when you make the statement here,
7 "That bill did not pass because most of the
8 physicians in the state and State Department of
9 Health itself opposed its passage," you have no idea
10 what the tobacco companies were doing either to
11 oppose the bill itself, or to influence doctors or
12 Health Department officials?

13 A. I have no knowledge of what they did.

14 Q. And then you go on in your next paragraph and
15 you say, "Another thirty years passed before the 1990
16 legislature --" --

17 A. I'm sorry, where is that?

18 Q. Bottom of the next paragraph. I'm sorry.

19 A. Bottom of the next paragraph. 1959 another
20 bill -- oh, I see.

21 Q. Thank you. You can read that paragraph, I don't
22 want to try to catch you off guard or anything here.

23 A. Uh-huh.

24 Q. "Another thirty years passed before the 1990
25 legislature enacted similar legislation."

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1 A. Uh-huh.

2 Q. Was that legislation opposed in 1990, do you
3 know?

4 A. I assume it was.

5 Q. But you don't know?

6 A. Well, the legislative hearings that I did review
7 did show that some legislators did speak in
8 opposition, yes.

9 Q. Was it opposed by the tobacco industry?

10 A. I have no way of knowing.

11 Q. You don't know who their lobbyist was in 1990?

12 A. No, I do not.

13 Q. You don't know if they had mounted one of the
14 most, in their self-proclaimed way, said was the most
15 effective lobbying campaign they'd ever targeted?

16 A. No.

17 Q. You don't know if they felt that they had hired
18 the most effective lobbyists in the state of
19 Minnesota?

20 A. I have no knowledge of that.

21 Q. You don't know if they said nothing less than
22 complete victory will be acceptable, in their
23 internal documents, among their own lobbyists, do
24 you?

25 A. I have no way of knowing that.

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1 Q. You have no idea how many telephone calls were
2 made to impact public opinion and public awareness by
3 the tobacco industry, do you?

4 A. No.

5 Q. And the reason you don't is that you defined out
6 of your question -- in the way that you proposed your
7 question, you defined out looking at tobacco
8 documents?

9 A. That is correct.

10 Q. You then go on, on page thirty-six, please.

11 A. Thirty-six?

12 Q. Yep.

13 A. (Complying.)

14 Q. End of the first paragraph -- it's talking about
15 the '60 and '63 legislation.

16 A. Uh-huh.

17 Q. "At the time, this piece of legislation would
18 have put Minnesota ahead of the rest of the nation,
19 but it did not pass."

20 A. True.

21 Q. Again, you don't know why it didn't pass?

22 A. No.

23 Q. You don't know what activity the tobacco
24 companies exerted against its passage, do you?

25 A. No.

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1 Q. Pardon me?

2 A. No, I do not.

3 MR. MANNING: Let's take a short break, okay?

4 THE WITNESS: Sure.

5 (Recess taken.)

6 BY MR. MANNING:

7 Q. You're still on your report there, sir?

8 A. Yes, I do.

9 Q. Page thirty-eight.

10 A. Thirty-eight?

11 Q. Please.

12 A. Yes.

13 Q. So it says at the bottom there -- it says,

14 "After some discussion, the resolution was approved

15 stating that --" this is now after --

16 A. The Minnesota Department of Health. Okay. Yes.

17 Q. Okay.

18 A. I see the context.

19 Q. "...resolution was approved stating that

20 cigarette smoking is causally related to lung cancer,

21 associated with deaths from cardiovascular diseases,

22 and increases the risks of dying from cancer and

23 emphysema"; right?

24 A. Yes.

25 Q. And you don't disagree with that?

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1 A. No.

2 Q. And you then go down to the bottom there in your
3 continuing historical analysis. You say in '74
4 Dr. Jesse Steinfeld, the former surgeon general,
5 spoke; do you see that?

6 A. Yes, I see that.

7 Q. And it goes on to the next page, he spoke about
8 the negative impacts that firsthand and even
9 secondhand smoke had on its inadvertent recipients;
10 do you see where you say that?

11 A. Yes, I see that.

12 Q. Dr. Steinfeld stated that, "Unequivocal data
13 have demonstrated that the cigarette smoker has a far
14 higher morbidity and mortality rate from cancer,
15 heart disease, and diseases of the lung than the
16 nonsmoker. No safe level has either been shown to
17 the smoker himself or his non-smoking companion who
18 were forced to breathe the polluted air which the
19 smoker pours into the environment"; that was quoted,
20 right?

21 A. Yes.

22 Q. And that's in 1974 that Dr. Steinfeld is telling
23 the House --

24 A. That's right.

25 Q. -- Subcommittee that; right?

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1 A. That is absolutely correct.

2 Q. And if the tobacco companies knew that in 1974,
3 then they should have told the legislature that, too;
4 correct? In some form or fashion?

5 A. I assume so.

6 Q. Yeah. If they knew, they should have told;
7 right?

8 A. If they were asked.

9 Q. And if they were asked. So okay. Let's back
10 up, then.

11 If the tobacco companies knew, but they weren't
12 asked, you think they shouldn't have told?

13 A. My understanding is that a legislative
14 hearing -- the witness is brought forward by one or
15 the other side advocating passage or non-passage of a
16 bill.

17 Q. Again, I'm not talking about restricted to a
18 legislative hearing. What I'm talking about here is
19 Dr. Steinfeld --

20 A. But this was done at a legislative hearing.

21 Q. I understand. It was also talking about
22 something that he knows, that I would assume he's
23 made this statement outside of the legislative
24 hearing, as well?

25 A. I would assume so.

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1 Q. So irrespective of whether it's a legislative
2 hearing, or any other public forum, if this is what
3 Dr. Steinfeld knew, and if the tobacco companies knew
4 the same thing, they should have spoken out just like
5 Dr. Steinfeld did?

6 A. Of course. Of course.

7 Q. Now, on page forty-one, middle, you say, "The
8 bill, styled as a tax incentive..." Do you see that?

9 A. Yes, I do.

10 Q. "...to encourage smokers to switch from high tar
11 to low tar brands, failed when the Legislature
12 learned that Minnesotans were already switching to
13 low tar brands"?

14 A. That is correct.

15 Q. And do you know whether or not the tobacco
16 companies had a major advertising push to have people
17 smoke low tar brands?

18 A. No, I do not know.

19 Q. You didn't look at that at all?

20 A. I've seen the ads, but I haven't, you know,
21 quantified that, no.

22 Q. Okay. And do you know whether or not switching
23 to a low tar brand in fact was something that was
24 good for your health?

25 A. I have no way of knowing whether it was or was

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1 not good for one's health. Although it was assumed
2 that low tar nicotine -- low tar and low nicotine was
3 better for one's health than high tar, high nicotine.

4 Q. Did you become aware of any studies or any
5 information anywhere, whether it was the complaint,
6 or any other sources, such as Richard Kluger, or any
7 other sources off the Internet, that in fact when
8 people have low tar brand cigarettes versus
9 high tar -- low tar/low nicotine,

10 high tar/high nicotine, that they smoke more?

11 A. I've seen such allegation made, yes.

12 Q. Where have you seen that?

13 A. I can't tell you where, but I've seen it widely
14 disseminated.

15 Q. And have you investigated whether that's
16 accurate?

17 A. I have no way of investigating that.

18 Q. But you have at least seen it widely
19 disseminated, that people who smoke low tar brands
20 smoke more in order to get the desired nicotine
21 effects?

22 A. I've seen that, yes.

23 Q. Whereabouts have you seen it?

24 A. I've seen it in newspaper accounts. I've seen
25 it in journal articles. I've seen it in -- I guess

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1 in reports on -- legislative sessions, things of that
2 nature, yes.

3 Q. Have you seen it also reported where people who
4 smoke low tar, they drag longer on the cigarette?

5 A. I've seen that, yes.

6 Q. Do you see where they also smoke the cigarette
7 down to the butt further than other cigarettes?

8 A. I've seen that alleged, yes.

9 Q. You've also seen the free nicotine?

10 A. I don't recall --

11 Q. You've also --

12 A. I don't recall the concept of free nicotine. I
13 do recall seeing the term, but I don't remember
14 specifically what that refers to.

15 Q. Do you know whether in fact a low tar brand --
16 what's advertised as low tar brands, in fact deliver
17 less nicotine --

18 A. I have no way of knowing that.

19 Q. -- than higher tar brands?

20 A. I have no way of knowing that, no.

21 Q. Okay. Do you know whether the tobacco industry
22 supported this bill?

23 A. I do not know what the tobacco industry's
24 position on this bill was, no.

25 Q. So you don't know whether the tobacco industry

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1 in 1977 was encouraging that this bill be defeated
2 because people were already switching from high tar
3 to low tar brands?

4 A. I don't know if that's the tobacco companies'
5 position. I know that was the position of -- of the
6 Revenue Commissioner, that there was no need for such
7 a bill.

8 Q. Now we go on to page forty-three.

9 A. Forty-three?

10 Q. Yes, sir, please.

11 A. Uh-huh.

12 Q. And there Dr. Koop came to Minnesota; right?

13 A. Yes. A number of times.

14 Q. And here's one time where there's a particular
15 piece of legislation; right?

16 A. That is correct.

17 Q. And Dr. Koop, in addressing the hearing, spoke
18 publicly about nicotine saying, quote, "The most
19 important thing we are trying to do is bring people
20 to realize that nicotine is addictive"; correct?

21 A. Yes.

22 Q. End of quote.

23 And then you say, "...reiterating an already
24 common theme of the State"?

25 A. That is correct.

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1 Q. Would you agree that at least by Dr. Koop's
2 words here that what he's saying, both expressedly
3 and impliedly, is that not everybody is aware of the
4 addictive nature of nicotine?

5 A. No, I don't understand that at all.

6 Q. How do you understand that?

7 A. I understand what he is saying is that we must
8 make them more aware.

9 Q. That's how you understood it?

10 A. Yes.

11 Q. More aware so it may impact their behavior?

12 A. That is correct, yes.

13 Q. And do you know whether this legislation was
14 fought by the tobacco companies?

15 A. I have no way of knowing that.

16 Q. Again, you haven't asked for those internal
17 documents?

18 A. No, I have not.

19 Q. You don't know whether internally they were
20 declaring that nothing short of a complete victory
21 vis-a-vis this legislation would be acceptable?

22 A. I have no way of knowing that.

23 Q. At least you know that by 1985 there is such a
24 thing as lobbying; right?

25 A. Oh yes. I'm aware of lobbying.

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1 Q. By that time we know it's in existence?

2 A. Oh sure.

3 Q. And used?

4 A. Oh yes.

5 Q. And likely used by the tobacco industry?

6 A. Likely, yes.

7 Q. So when you were writing this report you knew
8 that there likely was lobbying that was going on by
9 the tobacco industry, but you undertook no efforts to
10 determine what those were?

11 A. That is correct.

12 Q. And you knew that in the legislative halls, when
13 you are listening to those tapes that you go over to
14 get in the House library and the Senate library, on
15 and on, that you are hearing a very narrow part of
16 the picture?

17 A. I'm hearing what in fact were the committee
18 deliberations, yes. Whether you call it narrow or
19 broad, I have no way of knowing. It is the
20 deliberations that led either to the approval of the
21 bill to the full House or the full Senate, or the
22 non-approval of the bill, yes.

23 Q. But you're aware that a great deal of the
24 legislative process, particularly by 1985, took place
25 in the halls of the legislature, and in the offices

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1 of Senators and House Reps and in informal
2 conversations with lobbyists and other trade
3 representatives?

4 A. Yes.

5 Q. You're also aware here on page forty-five, that
6 first full paragraph, second sentence, in '90 to '92
7 the budget was cut for tobacco use prevention.

8 A. That is correct.

9 Q. Therefore, it's even more important, would you
10 not agree, that when public money is cut, to be spent
11 on issues of prevention, it's even more important for
12 tobacco companies to tell the truth?

13 A. Again, a question that I have to answer
14 I don't know.

15 Q. Don't you believe that the tobacco companies
16 telling the truth would assist in the anti-smoking
17 effort, particularly when anti-smoking efforts
18 budgets have been cut?

19 A. I would assume so, yes.

20 Q. Sure.

21 You then go on to say, in the middle of that
22 paragraph, that "In any case, the passage of a law
23 and the enforcement of that law are two different
24 parts of a single process," --

25 A. Uh-huh.

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1 Q. -- "...and throughout the history of Minnesota's
2 involvement with tobacco control, enforcement has
3 been spotty."

4 A. Yes.

5 Q. Have you ever talked to a highway patrolman?

6 A. Many times.

7 Q. About their enforcement of tobacco?

8 A. No.

9 Q. Have you ever talked to a police person of any
10 type?

11 A. Many times.

12 Q. About the enforcement of tobacco?

13 A. No.

14 Q. How can you make a statement as a historian that
15 enforcement has been spotty when you don't have any
16 knowledge of enforcement, do you?

17 A. I certainly do, from the basis of the historical
18 record.

19 Q. And what is that historical record that you're
20 speaking to so loudly about enforcement, sir?

21 MR. PURVIS: Object to the form of the
22 question.

23 THE WITNESS: The sum total of the evidence
24 coming out of legislative hearings, legislative
25 proceedings, accounts in the press, and the admission

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1 on the part of the state that it could not enforce
2 some parts of the legislation that it passed over
3 time.

4 BY MR. MANNING:

5 Q. You're not an expert in law enforcement?

6 A. No, I am not.

7 Q. You don't know anything about the -- how law
8 enforcement is prioritized, for example?

9 A. No.

10 Q. To protect the people of Minnesota, or people of
11 Minneapolis, or St. Paul, or anything of the sort, do
12 you?

13 A. No.

14 Q. And if laws are passed declaring certain things
15 that impact a product such as tobacco made by tobacco
16 companies, then you would expect those companies to
17 not do things that would circumvent that law; right?

18 A. Or be punished to the full extent of the law.

19 Q. If in fact --

20 A. If in fact they violated it, yes.

21 Q. So if in fact they violate it, --

22 A. If they violate it, certainly.

23 Q. So if they do things that are fraudulent; if
24 they do things that are in violation of anti-trust
25 laws; if they do things that are in violation of

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1 consumer protection laws and they circumvent the law
2 and they know it, then they ought to be punished,
3 right?

4 A. My view is, as an individual, certainly. As a
5 citizen, certainly.

6 Q. Okay.

7 A. As a Minnesotan, certainly.

8 Q. Absolutely?

9 A. As a historian, I have no evidence.

10 Q. You have no evidence of whether or not the
11 tobacco companies have circumvented the law because
12 that was not part of your historical analysis?

13 A. Exactly.

14 Q. But it, in fact, could be, couldn't it?

15 A. It could be if someone else wants to make it.

16 Q. That's right.

17 So if you, sir, wanted to have reviewed a
18 tobacco company's documents to determine whether or
19 not they had in fact circumvented the law over a long
20 period of time, it's something that you could have
21 done?

22 A. I could have done so, yes.

23 Q. And you didn't ask to do that, did you?

24 A. No.

25 Q. And you didn't tell them that it would only be

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1 fair for you to do that if you were going to also
2 analyze this case under the question that you did?

3 A. No.

4 Q. How would you summarize your opinion, sir, in
5 this case?

6 A. Well, essentially this is a summary. This whole
7 report is a summary.

8 Q. Uh-huh.

9 A. But if you want a one-sentence summary, --

10 Q. I'm not going to restrict you to one sentence.
11 You can talk as long as you'd like. I'd like a
12 summary of your opinion.

13 A. All right.

14 That from the beginning of the existence of
15 cigarettes, limit it just to that, the health hazards
16 of cigarettes have been extensively known and made
17 abundantly aware of by various different respected
18 and respectable groups in our society, coupled with
19 the schools and other public agencies of that kind.

20 That the state attempted to assist in the restriction
21 of smoking, particularly to minors, and at one time
22 even outlawed and prohibited the sale, manufacture,
23 and distribution of cigarettes in the state.

24 At the same time, the state also benefited in
25 many ways from the sale of tobacco, tobacco

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1 products.

2 Over time, however, the state has had an
3 admirable record as being a leader in tobacco
4 prevention, disease, awareness, and things of that
5 nature. Both through legislation, through actions of
6 the executive branch, and through the school systems.

7 Q. Anything else?

8 A. Pardon?

9 Q. Anything else?

10 A. That's my shorthand summary.

11 Q. Do you know Phyllis Kahn?

12 A. I certainly do.

13 Q. Is she your State Rep?

14 A. Yes. She's not my State Rep, but she is a
15 State Rep, yes.

16 Q. How do you know her?

17 A. Um --

18 Q. Socially?

19 A. How do I know her?

20 Q. (Nodding.)

21 A. I know her both in the political realm and in
22 the personal realm.

23 Q. Do you support the work she's done?

24 A. Absolutely. Wholeheartedly.

25 Q. Good work?

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1 A. Yes.

2 Q. And some of that goes to your comment here at
3 the end that the State has led the tobacco charge, --

4 A. I'm sorry.

5 Q. -- so to speak?

6 A. Sorry?

7 Q. At the end of your summary, --

8 A. Yes.

9 Q. -- opinion, it was a compliment to the State?

10 A. Absolutely.

11 Q. And to people like Phyllis Kahn?

12 A. And to people like Phyllis Kahn.

13 Q. And you said from the beginning of time, the
14 beginning of cigarettes, people have known of the
15 health hazards?

16 A. I could have modified that and said from the
17 beginning of the existence of tobacco as a consumer
18 product. That would bring it back to the time of the
19 James the First statement and so on and so forth,
20 but...

21 Q. What is that time, then, beginning of its
22 existence as a consumer product? What is that point
23 in time?

24 A. Beginning of the seventeenth century. End of
25 the sixteenth, beginning of the seventeenth century.

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1 Q. So everybody is -- I mean basically, then,
2 you're talking about the Western World, as you know
3 it, has been aware? Not just America and Minnesota,
4 when it came into existence later, --

5 A. Well, --

6 Q. -- but the Western World and the European World,
7 you're saying from the beginning of the 1600s has
8 been aware of the health hazards?

9 A. I couldn't speak about Spain, Portugal, France,
10 Germany, Russia, the Scandinavian countries, and any
11 other European country, but I can talk about England,
12 at least. And the evidence there, of course the
13 United States was a part of the English empire at the
14 time and so on.

15 Q. Right.

16 And then you say the state attempted to assist
17 in the restriction of smoking to minors and outlawed
18 it, et cetera?

19 A. (Nodding.)

20 Q. You've agreed that you at least assume that the
21 tobacco companies were well aware of those laws and
22 those restrictions?

23 A. I would hope so.

24 Q. And you say the state benefited?

25 A. Yes.

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1 Q. But we've previously discussed that you have
2 never looked at -- in any way, shape, or form, the
3 cost to the state?

4 A. That is correct.

5 Q. Did you specifically review any tobacco company
6 advertising other than what you ran across in the
7 papers and whatnot?

8 A. No.

9 Q. But you did consider the advertising as a part
10 of your opinion?

11 A. Yes.

12 Q. Whatever advertising you ran across, it was
13 considered in your opinion?

14 A. Yes.

15 Q. You did not consider defendants' statements
16 denying -- defendants here being the tobacco
17 companies, as well as the tobacco industry groups,
18 such as the Council For Tobacco Research and the
19 Tobacco Institute, you did not consider their
20 statements denying the causation of cigarette smoking
21 to cancer, did you?

22 A. Oh, I considered it, but I didn't take it
23 into -- didn't give it high qualitative value.

24 Q. You were aware of it, but you do not go into the
25 depth or the breadth with which they made those

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1 statements?

2 A. That's correct.

3 Q. You did not historically research how far and
4 wide and sweeping those statements were?

5 A. No.

6 Q. Or people's knowledge of those statements and
7 the impact on people; correct?

8 A. That's correct.

9 Q. But you were aware, and still are aware today,
10 that for a long period of time tobacco companies
11 consistently denied that, one, cigarettes were
12 addictive -- are you aware of that?

13 A. Yes.

14 Q. And that they denied that cigarettes caused
15 cancer?

16 A. That's correct.

17 Q. Now you wouldn't in any way, shape, or form want
18 to say to this judge or jury that the people of
19 Minnesota know more than the tobacco companies
20 themselves about the risks of smoking, would you?

21 A. That is not what I'm saying, no.

22 Q. In fact, we've previously established that it's
23 even your view that the tobacco companies themselves
24 would know more about the risks of smoking --

25 A. They may know. I have no way of knowing that.

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1 That's a question that, again, I did not do any
2 research on.

3 Q. Okay. But you're at least not in any way saying
4 that the people of the State of Minnesota knew more
5 than the tobacco companies?

6 A. I wouldn't say that they knew more than the
7 tobacco companies. But they certainly knew from
8 everything that they were able to perceive and
9 assimilate from neutral, non-industry sources, that
10 cigarette smoking was in fact harmful, yes.

11 Q. But, again, there's no way that you can say that
12 the State of Minnesota or the people of Minnesota
13 knew more than the tobacco companies because you
14 haven't evaluated the breadth and depth of what the
15 tobacco companies knew?

16 A. I think that the breadth and depth of the health
17 hazards of smoking were so deeply known and so
18 pervasive in our society, that what the tobacco
19 companies did or did not do would not make any major
20 impact.

21 Q. That's not the question.

22 The question is that the tobacco companies,
23 we've already said know, as the manufacturer of their
24 product, more about their product than anyone else;
25 right?

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1 A. I would assume so. I would hope so.

2 Q. And hence they have more knowledge on a
3 day-to-day basis because they're the ones making it
4 and putting it out, studying it, and involved with it
5 heavily on a day-to-day basis, than any amorphous
6 State of Minnesota; correct?

7 A. That's correct.

8 Q. Do you think the state did something wrong with
9 respect to tobacco control?

10 A. I think the state did the best it could.

11 Q. Okay.

12 A. I mean that given the historic circumstance, the
13 historic times, the state did the best -- it did
14 better than most other states. Let's put it that
15 way.

16 Q. Maybe the best of any state?

17 A. Maybe the best of any state. In fact I think I
18 stated here, that's -- did I say the best? If not,
19 among the best.

20 Q. The very top of the best?

21 A. Very top, yes.

22 Q. Or close to the top of the best by way of
23 tobacco control?

24 A. No question about that.

25 Q. I want you to assume some things with me, okay?

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1 A. Pardon me?

2 Q. I want you to assume some things with me.

3 A. Let me preface my statement here in response to
4 your question: That assumptions are something that
5 historians don't do without evidence. Okay?

6 Q. I understand.

7 A. So, please, I'll go along with you.

8 Q. Believe me, it's a proper procedure in a
9 court of law, --

10 A. All right.

11 Q. -- or your counsel wouldn't allow it, see.

12 A. I understand that.

13 Q. All right.

14 A. But I also want to inform you what historians do
15 and don't do.

16 Q. I understand. But I need to ask you these
17 questions because you didn't look at the tobacco
18 companies' documents.

19 A. That's true.

20 Q. So I need to fill in the other half of this
21 equation, at a minimum, and some of that is going to
22 be done through assumptions. Okay? And I just want
23 you to hang with me here for a minute.

24 I want you to assume that, one, tobacco
25 companies can in fact influence kids, twelve- to

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1 eighteen-year-olds; okay? That's what I mean when
2 I'm saying kids. One, they can do that.

3 Two, that they do in fact target them. They
4 study them and target them. Okay?

5 That they do advertise to them.

6 That they do promote to them.

7 And that they spend very, very, very little
8 money telling kids of the consequences of smoking,
9 versus the promotion of it; okay? Almost negligible
10 in relationship to the promotion of it.

11 They also know that the only way that they can
12 continue their market share is to get kids in the
13 twelve to eighteen, and hook them, addict them. And
14 they know if they do, it works. That they'll gain
15 market share and increase sales, and on and on.

16 If, in fact, tobacco companies do that, would
17 you agree that they shouldn't?

18 MR. PURVIS: Object to the form.

19 THE WITNESS: This is now, again, basing my
20 statement on my view as a public person, not as a
21 historian. Not here as an expert.

22 Yes.

23 BY MR. MANNING:

24 Q. Would you agree that it's wrong?

25 A. Wrong? I'm sorry.

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1 Q. Would you agree that it's wrong to do that?

2 A. Wrong to -- wrong to the state --

3 Q. Do all the things I just said--to target kids,

4 go after them, and get them?

5 A. If they're doing that, yes.

6 Q. And would you agree that at least in part, by

7 you being here today and rendering testimony on -- on

8 behalf of the tobacco companies, that you are at

9 least in some small way impliedly supporting that

10 activity?

11 MR. PURVIS: Object to the form.

12 THE WITNESS: Absolutely not.

13 BY MR. MANNING:

14 Q. Have you told them you don't support that

15 activity?

16 A. No.

17 Q. You haven't discussed it with them before I

18 brought it up right here; correct?

19 A. That is correct.

20 Q. Even though you have seen all of the things that

21 I stated alleged, one, in the complaint; two --

22 Right?

23 A. Yes.

24 Q. Two, discussed in the Kluger book; correct?

25 A. Yes.

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1 Q. Discussed in the tobacco papers on the Internet?

2 A. Yes.

3 Q. And you never brought it up with the tobacco
4 companies in the two and a half years you've been
5 working for them, until I brought it up today, and
6 you still haven't brought it up with them, have you?

7 A. That's correct.

8 Q. Do you agree, sir, that by the documents you've
9 seen, at least by the ones you have seen, that in
10 fact the tobacco companies have created a false
11 controversy about tobacco not definitively causing
12 cancer or disease, and even holding out some remote
13 possibility that there's something safe about it?

14 MR. PURVIS: Object to the form.

15 BY MR. MANNING:

16 Q. Based on the documents you've seen, you have
17 seen that the tobacco companies at least in some
18 small way, based on the small number of documents you
19 have seen, have attempted to create that false
20 controversy; correct?

21 A. I can't answer that question since I haven't
22 seen the documents that refer to that.

23 Q. And the reason you haven't seen those documents,
24 at least one of the reasons, is that you haven't
25 asked for them; right?

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1 A. That is correct.

2 Q. Let me ask you a question about professional
3 integrity and ethics of your own as an academic.

4 If you, sir, see at some point in time, whether
5 it's in this deposition or later, something that
6 causes you to believe, firmly believe, that tobacco
7 companies have lied to Minnesotans and to fellow
8 Americans, will you withdraw as an expert in this
9 case?

10 MR. PURVIS: Object to the form.

11 THE WITNESS: It would have to be conclusive.

12 BY MR. MANNING:

13 Q. Conclusive?

14 A. Yes.

15 Q. But if it was conclusive you would withdraw;
16 correct?

17 A. Yes. And if it had a bearing on my conclusions.

18 Q. And if there was something to suggest that
19 possibility, that tobacco companies had lied, would
20 you demand to take a look at it and have them pay for
21 whatever hours you spend looking at it in order to
22 determine -- for you to determine whether or not you
23 can come to a conclusive conclusion?

24 MR. PURVIS: Object to the form.

25 THE WITNESS: That is not the question that I'm

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1 researching as a historian. I am not doing any work
2 on the role of the tobacco companies in this
3 particular instance. You'd have to get someone else
4 to do that for you.

5 BY MR. MANNING:

6 Q. Sir, I'm not asking you to do it for me. Let me
7 be clear about that, okay? What I'm asking is
8 whether you, as a person of academic integrity, will,
9 if it is suggested by documents, will demand of your
10 clients that you be allowed to undertake that
11 research?

12 MR. PURVIS: Object to the form.

13 THE WITNESS: I am not interested in what the
14 tobacco companies did or did not do. I am interested
15 in what in fact the people of Minnesota and the
16 United States and the State of Minnesota, through its
17 various agencies and bodies did/did not know, did do,
18 and did not do.

19 BY MR. MANNING:

20 Q. Would you submit your expert report to a
21 peer review journal?

22 A. I certainly would.

23 Q. You would?

24 A. Yes.

25 Q. And you've sat on peer review journals?

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1 A. Oh, I have.

2 Q. Many?

3 A. Many.

4 Q. Have you ever rejected an article?

5 A. Oh yes, I've rejected articles.

6 More often than not, I've not outright rejected,
7 but asked for revisions.

8 Q. Sir, have you seen in the course of your
9 historical analysis these statistics: By age
10 seventeen 77% percent of kids have tried smoking and
11 25% have become regular smokers? Have you seen that?

12 A. I don't recall having seen those figures. But
13 the general, you know, content of what you're saying,
14 I've come across, yes.

15 Q. Have you seen that 73% of minors who smoke
16 started by age fifteen?

17 A. I don't know whether that's the exact figure
18 I've seen, but it was a large number, yes.

19 Q. Have you seen that 2.7 million children have
20 smoked a whole cigarette by their thirteenth
21 birthday?

22 A. That I didn't see. But I could understand that,
23 yes.

24 Q. Have you seen that 75% of eighth graders and 89%
25 of tenth graders say that cigarettes are easy to get?

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1 A. I haven't seen that, but it doesn't surprise me.

2 Q. Have you seen that minors smoke over five
3 hundred million packs of cigarettes per year, half of
4 these are illegally sold, garnering over five hundred
5 million in illegal sales; have you seen that?

6 A. No. It doesn't surprise me. That's the reason
7 that the State of Minnesota wanted to have more
8 strict enforcement of sales to minors, and just last
9 year passed it. The first really effective piece of
10 legislation in that regard.

11 Q. What's that?

12 A. At least I hope it's effective.

13 Q. You haven't tested whether it's effective?

14 A. No. Of course not. Too soon.

15 Q. In the course of your research did you see that
16 89% of adult daily smokers started smoking by age
17 eighteen?

18 A. I have seen -- I don't know if that's the exact
19 figure I've seen, but a large number, yes.

20 Q. Have you seen that 44% of teens who smoke
21 regularly are daily smokers?

22 A. I don't know that to be a fact, but it doesn't
23 surprise me.

24 Q. Have you seen that one-third to one-half of kids
25 who experiment with smoking become regular smoking --

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1 smokers?

2 A. I haven't seen that statement but, again, it
3 wouldn't surprise me.

4 Q. If it was in the surgeon general's '94 report it
5 wouldn't surprise you?

6 A. No, it would not. And I've probably seen it,
7 but I don't recall it, yes.

8 Q. Have you seen that 63% of teen smokers
9 considered themselves addicted to cigarettes?

10 A. I haven't seen that figure, but, again, it
11 wouldn't surprise me.

12 Q. Have you seen that 70% of teen smokers who say
13 that given the chance to do things differently they
14 wouldn't have started smoking?

15 A. They wouldn't have started smoking?

16 Q. Yes.

17 A. Yes, I certainly do agree with that.

18 Q. Have you seen that the younger a child begins
19 smoking, the more likely it is that he or she will
20 become a heavy smoker as an adult?

21 A. I haven't seen such a statement, but again, it
22 wouldn't surprise me.

23 Q. Have you ever had your work funded by the
24 tobacco industry before this time?

25 A. No.

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1 Q. In any way, shape, or form?

2 A. No. No way, shape, or form.

3 Q. Do you agree that cigarettes should be regulated
4 by the FDA?

5 A. As a historian? Or as an individual?

6 Q. Either.

7 A. As a historian, I have no opinion on that. But
8 as an individual, yes.

9 Q. Do you presently plan to do any other work in
10 the formulation of your opinion or report or
11 anywhere?

12 A. I will continue reading, studying, researching,
13 to either modify this, change this, refine it. Hone
14 it. Whatever is necessary.

15 Q. Have you been asked --

16 A. In other words -- in other words, this is a work
17 if progress, so to speak.

18 Q. That's your view. This is not a final report?

19 A. Well, it's the final report as of July 1.

20 Q. What are you going to continue to do?

21 A. Pardon me?

22 Q. What are you going to continue to do?

23 A. Continue to look for more documentation having
24 to do with the general question of public awareness.

25 Looking at more documentation having to do with

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1 different state agencies' responses to the issues of
2 hazards of smoking.

3 Q. You will continue to keep your question narrowly
4 defined in that respect?

5 A. That is correct. I am not interested in what
6 the tobacco companies do or do not do.

7 MR. MANNING: Take a short break.

8 (Recess taken.)

9 BY MR. MANNING:

10 Q. Okay. Professor, earlier you told me that you
11 recall seeing this article in New York Times about
12 some statements that an executive from Philip Morris
13 made. I just am going to read to you, see if this
14 refreshes your memory.

15 Do you recall that a gentleman named Mr. Motley,
16 it was reported, asked a Mr. Bible, from
17 Philip Morris, would Philip Morris agree that a
18 single American citizen who smokes their products for
19 thirty or more years, a single one, has ever died of
20 a disease caused in part by smoking cigarettes. And
21 Mr. Bible, it was reported, answered, "I think
22 there's a fair chance that one would have, might
23 have"; do you recall seeing that?

24 A. I certainly do, yes.

25 Q. Then the next question which was reported in the

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1 same article said, "How about a thousand?" "How
2 about a thousand?" Mr. Motley asked. And Mr. Bible
3 said, "Might have."

4 Do you recall seeing that?

5 A. I do.

6 Q. And the next question was, "How about a hundred
7 thousand?" Mr. Motley asked. And Mr. Bible
8 responded, "Might have"; right?

9 A. Yes, I remember seeing that.

10 Q. Then you recall it went on to say afterwards,
11 Mr. Motley said on CNN, "I salute Philip Morris for
12 the first time in forty years, being forthright and
13 candid; it's a very public health spirited way of
14 looking at things"?

15 A. I saw that in the article, yes.

16 Q. Went on to say, "The public health officials
17 estimate that four hundred fifty thousand Americans
18 die each year from illnesses caused by smoke and
19 second-hand smoke."

20 A. Yes.

21 Q. Yep?

22 A. I didn't recall the figure four hundred fifty
23 thousand, but yes, I do recall that particular
24 article.

25 Q. And what I read to you, you recall being

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1 something as you would -- reading the New York Times,
2 as a part of your work as an expert, to stay current
3 with what's happening in the press? That's part of
4 what you were describing as your ongoing work in your
5 report?

6 A. Yes.

7 Q. Correct?

8 A. Yes.

9 Q. And that's one of the things you'll continue to
10 do?

11 A. Yes.

12 Q. And you recall that this was an event that was
13 reported as something that was different than
14 anything that had occurred for the last forty years?

15 A. Yes.

16 Q. By way of public statements of the tobacco
17 industry?

18 A. So it was reported in the times, yes.

19 Q. And that's one of the reasons it caught your
20 interest?

21 A. I am sorry?

22 Q. That was one of the reasons it caught your
23 interest, is that it was different? It was saying
24 that the tobacco companies had said something
25 publicly, or in a deposition, different than they had

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1 ever stated publicly before?

2 A. No, that isn't the only reason it caught my
3 interest. It caught my interest because I read
4 everything now that comes out on the tobacco
5 litigation, to keep current with what's going on,
6 yes.

7 Q. Okay. That was one of the reasons it caught
8 your interest, though, because it was different?

9 A. Yes.

10 Q. It was different, what was stated there, by that
11 individual, than what had been stated publicly in the
12 prior forty or fifty years?

13 A. That is certainly what the New York Times
14 article said, yes.

15 Q. That's how you understood it?

16 A. Yes.

17 Q. And so then you knew at least at that point in
18 time, and I'll represent to you it was August 22, '97
19 when that article appeared, that you at least knew
20 that the companies that you were working for, that
21 the chief executive of Philip Morris had stated under
22 oath that it's very likely that his products have
23 caused a hundred thousand deaths; correct?

24 A. Well, let me just say, I'm not working for
25 Philip Morris or for the tobacco companies.

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1 Q. You just know that the money that goes into your
2 pocket is from them?

3 A. I assume that's where the money is coming from.

4 Q. Right.

5 A. But I'm not working for them. I'm doing
6 historical research, independent of them.

7 Now, your question? I'm sorry.

8 Q. Well, -- but in fact, sir, you would agree with
9 me that if all of your research, and your research
10 assistants, the eight of them, are being paid by the
11 tobacco industry, you're not independent of them?

12 A. No, of course not.

13 Q. Right.

14 A. No, I mean let's be realistic about it. They're
15 the ones that got the deep pockets, of course.

16 Q. From reading that article in the New York Times
17 about what Mr. Bible said about his products causing
18 cancer, you concluded at a minimum -- at a minimum,
19 when you read that, that they had not been forthright
20 for many years in the past about what they knew?

21 A. One could so conclude, yes.

22 Q. And you concluded that?

23 A. Within reason. Let's put it that way.

24 Q. Well, you can conclude...

25 And you're not a medical doctor; correct?

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1 A. No.

2 Q. You're not a behavioral scientist?

3 A. That is correct.

4 Q. As a historian you do not speak about the
5 cognitive workings of the human mind; correct?

6 A. No.

7 Q. You're not an expert in psychological theory?

8 A. Not at all.

9 Q. You, in your report, basically say that the
10 state, and by that you're saying some Minnesotans;
11 right?

12 A. Depending on what context. The state could be
13 the legislature, could be the governor. Could be the
14 Health Department. Could be the Department of
15 Education. The state as an entity. It depends on
16 what -- in what context.

17 Q. So sometimes in your report the context is very
18 clear because you're talking about what the governor
19 did?

20 A. Yes.

21 Q. And then it's the governor. And if it's the
22 Department of Education, then it's that department.

23 A. Yes.

24 Department of Health.

25 Q. And if it's the Department of Health, then it's

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1 that department. When it's not clear whether it's
2 the legislative branch or executive branch of
3 government, then what -- when you say the word
4 "the state" you're talking about Minnesotans?

5 A. I'm talking about the state of Minnesota, yes.

6 Q. When you say the state of Minnesota you're
7 talking about the Minnesotans?

8 A. Depends on, again, the context.

9 Q. But in your report when you talk about the state
10 of Minnesota, and there was a time you told me you
11 were talking about Minnesotans.

12 A. Minnesotans, talking about the people.

13 Q. Right.

14 A. The state, probably talking -- I can't, you
15 know, fully -- you know, guarantee it in every case,
16 I'm probably talking about some state agency,
17 state entity, legislative, judicial, executive
18 branch, et cetera.

19 Q. But whenever you're talking about Minnesotans,
20 you never know how many of them you're talking
21 about? Because levels of awareness on any one issue
22 can change --

23 A. Absolutely.

24 Q. -- day-to-day, week-to-week, month-to-month?

25 A. Absolutely, yes.

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1 Q. So whenever you're talking about Minnesotans, we
2 never know precisely the percentage of Minnesotans
3 you're talking about?

4 A. Except where we have survey data to back this
5 up.

6 Q. Uh-huh.

7 A. That -- from 1947 on we have the Minnesota poll
8 to help us in that regard.

9 Q. Uh-huh. And then we have to go in and analyze
10 precisely what questions were asked?

11 A. Right.

12 Q. How it was done, to what degree of scientific
13 accuracy it is?

14 A. Exactly.

15 Q. And you haven't done that?

16 A. No, I haven't done that.

17 Q. You just read the results of that?

18 A. No. I did more than that.

19 Q. You read the poll?

20 A. Yes.

21 Q. Now, Minnesotans at least, in 1880, you say knew
22 certain things, like the health hazards of smoking;
23 right?

24 A. Yes.

25 Q. And you also say they knew certain things about

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1 the health hazards of smoking in 1950 -- in the '50s;
2 right?

3 A. Yes.

4 Q. How do you reconcile that Minnesotans knew in
5 1880 and in 1950, and the tobacco companies deny
6 it -- deny, for example, that smoking causes cancer
7 right into the '90s? How do you reconcile it?

8 A. I don't reconcile it at all. It's not my
9 purpose to reconcile it at all.

10 Q. You just don't do it?

11 A. Pardon me?

12 Q. You just don't do it? You just ignore it?

13 A. No. Let someone else do it.

14 Q. Good.

15 A. That's not my purpose.

16 Q. Like a jury?

17 A. A jury certainly would be helpful in that
18 regard.

19 Q. Okay. Sir, I want to show you the complaint
20 that you read.

21 A. Uh-huh.

22 Q. Okay?

23 MR. MANNING: Let's mark that, please. I don't
24 have another copy. I assume there's a lot of them
25 around.

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1 (Exhibit 3136 marked for identification.)

2 MR. MANNING: Thank you.

3 BY MR. MANNING:

4 Q. Sir, showing you what's been marked as a copy of
5 the amended complaint; okay?

6 A. Uh-huh.

7 Q. I'm going to ask you to scan through it and then
8 I'm going to read parts with you.

9 A. Do you want me to read the whole thing?

10 Q. Just scan through it and see if this is the
11 document that --

12 A. There's a page missing. Oh, I'm sorry. Okay.

13 Q. Or is close to the document that you recall
14 reading. I mean you're not going to have exact
15 recollection of what you read two years ago.

16 A. It's over two years ago that I read it.

17 Q. Does it generally look like the document you
18 read two years ago? And then I'm going to walk you
19 through parts of it.

20 A. It generally looks like the document, yes.

21 Q. It does?

22 A. (Nodding.)

23 Q. Okay. And it's a 56-page document?

24 A. It is a 56-page document, yes.

25 Q. Signed by my partners, Michael Ciresi and

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1 Roberta Walburn?

2 A. That is correct.

3 Except it's dated November 25, 1996. And I saw
4 it in November of 1994.

5 Q. That's the first time you saw it?

6 A. That's the first time and only time.

7 Q. Okay. We're going to back up to page one, okay?

8 A. Page one?

9 Q. Yes, sir.

10 Now you recall seeing that it was in the county
11 of Ramsey. And it was the State of Minnesota, by
12 Hubert Humphrey, its Attorney General. Blue Cross
13 Blue Shield versus all these tobacco companies;
14 right?

15 A. Yes.

16 Q. You did read the complaint when it was given to
17 you?

18 A. Yes, I did.

19 Q. Did you take it home?

20 A. I believe so, yes.

21 Q. Took it home, read it?

22 A. Yes.

23 Q. Did you say send it back, or --

24 A. No, I think I kept it. But whether I still have
25 it or not is -- I don't know. I really don't know.

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1 Q. Did you show it to Michael and what's the other
2 gentleman's name?

3 A. Michael and David.

4 Q. David.

5 A. I don't recall whether I showed it to them or
6 not. I really don't recall that.

7 Q. How about the six researchers in
8 Washington, D.C., did they want to see the complaint
9 in the case?

10 A. I don't know anything about that, no.

11 Q. Okay. Now I'm going to show you there on page
12 two, paragraph three, second sentence, it says,
13 "The death toll in one year alone from cigarette
14 smoking equals the number of American lives lost in
15 battles in all the wars this country has fought this
16 century. Overwhelmingly, the new recruits in this
17 death march are children and adolescents"; do you see
18 that statement?

19 A. I've seen that, yes.

20 Q. And you've read that before?

21 A. I think I have, yes.

22 Q. Did that cause you to want to broaden the
23 question that you were going to research at all?

24 A. No.

25 Q. I'm going to ask you to turn to page thirteen.

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1 A. Thirteen? Yes, sir.

2 Q. Do you see there, going down about four
3 sentences it says, "One of the first..."

4 In the right-hand --

5 A. "One of the first of these studies..."

6 Is that --

7 Q. Yes.

8 A. Yes.

9 Q. -- "...was published in 1952 by Dr. Richard
10 Doll, a British researcher. Dr. Doll, in a
11 statistical analysis, found that lung cancer was more
12 common among people who smoked and that the risk of
13 lung cancer was directly proportional to the number
14 of cigarettes smoked."

15 A. Yes.

16 Q. You saw that?

17 A. I saw that, yes.

18 Q. And that was confirmed by your historical
19 research?

20 A. That is absolutely correct.

21 Q. Likewise, the next study by Dr. Wynder --

22 A. Wynder.

23 Q. Wynder.

24 A. Dr. Wynder.

25 Q. Thank you.

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1 Was confirmed in your historical research?

2 A. That is correct.

3 Q. Likewise, the last sentence, "Malignant tumors
4 grew in 44% of the mice, providing biological
5 confirmation of the cancer-causing properties of
6 cigarettes"; that was also confirmed in your
7 historical analysis?

8 A. That's what Dr. Wynder found, yes.

9 Q. So it was confirmed in your historical research?

10 A. Yes, absolutely.

11 Q. So what you read in the complaint, at least in
12 this paragraph, as to these issues, was confirmed in
13 your historical research?

14 A. Yes.

15 Q. Then in paragraph twenty-two there, it says,
16 "The Doll and Wynder studies generated widespread
17 public concern about the health hazards of
18 cigarettes"; right?

19 A. That's correct.

20 Q. And you confirmed that?

21 A. Yes.

22 Q. "Confronted with this evidence, the presidents
23 of the leading tobacco companies met at an
24 extraordinary gathering in the Plaza Hotel in
25 New York City on December 15, 1953"; do you see that?

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1 A. Yes.

2 Q. Did your historical research confirm that that
3 meeting took place, too?

4 A. I have no recollection of seeing the minutes of
5 that meeting or any references to that meeting except
6 as referenced here in the complaint.

7 Q. Okay. But you did see it referenced here in the
8 complaint?

9 A. Yes, I have. Yes.

10 Q. Back in November -- in spring of '95? Fall of
11 '95?

12 A. Fall of '95.

13 Q. Fall of '95.

14 And so what was referenced here was this Hill
15 and Knowlton memorandum, it goes on, on page
16 fourteen; right?

17 A. Yes.

18 Q. It says according to the memo, "a" the companies
19 had not met together since two previous antitrust
20 decrees. It goes on, right?

21 A. Uh-huh.

22 Q. Right?

23 A. That's what it says, yes.

24 Q. And you read what was in "a," all of it?

25 A. Yes, I have.

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1 Q. You read all of what was in b?

2 A. Uh-huh.

3 Q. Ask you --

4 A. My recollection was I did at the time, yes.

5 Q. And then item c?

6 A. Item c?

7 Q. Item c you also read, right?

8 A. Yes.

9 Q. And it said that, "The industry leaders feel
10 that the problem is one of promoting cigarettes and
11 protecting them from these and other attacks that may
12 be expected in the future and that the industry
13 should sponsor a public relations campaign which is
14 positive in nature and is entirely pro-cigarettes";
15 you read that?

16 A. I have, yes.

17 Q. Was that confirmed by your historical research?

18 A. No, I have not seen anything to confirm or to
19 affirm -- or to negate, rather. I'm sorry.

20 Q. Then we go over to page fifteen, item f. Then
21 you see that Hill and Knowlton was to play a central
22 role in the formation of an association for the
23 industry; right?

24 A. That's what it says, yes.

25 Q. And did you confirm that in any source other

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1 than this complaint?

2 A. No.

3 Q. In Kluger's book was that confirmed?

4 A. Oh, in the book on "Ashes to Ashes"? Yes, it
5 was.

6 Q. So it was confirmed there?

7 A. Yes. He, of course, reports that there, yes.

8 Q. And how about in "The Smoking Papers" book?

9 A. I don't recall it in "The Smoking Papers" book,
10 but I didn't read the entire book.

11 Q. You just read the description of it on the
12 Internet?

13 A. Exactly. Exactly.

14 Q. And then I'll ask you to turn to page sixteen.

15 A. Sixteen.

16 Q. Of course, you're welcome to read along all the
17 way to it.

18 A. Surely.

19 Q. Where it says --

20 A. Number twenty-five?

21 Q. Yes. Paragraph twenty-five. I'm going to go
22 right down to the bottom of that. Talking about the
23 advertisement in the Frank Statement; right?

24 A. (Reviewing document.)

25 Q. Do you see, "The advertisement was captioned

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1 'A Frank Statement to Cigarette Smokers"'; do you
2 see that?

3 A. Yes.

4 Q. "The advertisement stated, in part, as follows:"
5 I'm going to read to you number c.

6 A. C?

7 Q. "There is no proof that cigarette smoking is one
8 of the causes of lung cancer"; correct?

9 A. That's what it states there, yes.

10 Q. And you believe that statement to be false at
11 that time?

12 A. At that time I believe it to be ambiguous,
13 perhaps false.

14 Q. But --

15 A. I am not sure.

16 Q. Okay. And when you read that statement, --

17 A. Yes.

18 Q. -- when you were given this assignment, --

19 A. Right.

20 Q. -- you had the same belief? It was either false
21 or perhaps false? Or perhaps ambiguous?

22 A. Or ambiguous. And self-serving.

23 Q. Self-serving?

24 A. Self-serving, yes.

25 Q. And when you read that, again, you didn't

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1 broaden your inquiry?

2 A. No.

3 Q. You didn't demand to take a look at that issue?

4 A. Not at all.

5 Q. Then you see the statement I read to you

6 earlier, d, right? "We accept an interest in

7 people's health...?"?

8 A. Yes, you read that earlier.

9 Q. -- "...as a basic responsibility, paramount to

10 every other consideration in our business"?

11 A. I recall you reading that, yes.

12 Q. When a company makes a statement like that

13 publicly and states that they're going to make our

14 health the number one concern and paramount, and when

15 they state it they should do it; right?

16 A. Oh certainly.

17 Q. Then it says in item paragraph -- page

18 seventeen, paragraph f, it says we always --

19 A. Page seventeen, paragraph?

20 Q. F.

21 A. A, B, C, D -- oh here, first one, right.

22 Q. Correct.

23 "We always have and always will cooperate

24 closely with those whose task it is to safeguard the

25 public health"?

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1 A. I've seen that.

2 Q. And you would expect if they made a statement
3 like that, that they would give over and disclose any
4 information and research that they have related to
5 health issues to the public health bodies; correct?

6 A. I would hope so, yes. Yes.

7 Q. Because that's what they're saying they would
8 do?

9 A. Pardon me?

10 Q. That's what they're saying they would do?

11 A. Yes, of course.

12 Q. And if they didn't do that, if they didn't give
13 that health information they had to the surgeon
14 general or to the CDC, --

15 A. Right.

16 Q. -- or to other public health bodies,
17 legislatures, on and on, then they would be in
18 contradiction of f?

19 A. I would think so, yes.

20 Now you're asking me my opinion here and that's
21 what I'm giving as a personal opinion.

22 Q. Yeah. We'll talk about that.

23 A. And I hope it's clear to you that I am in fact
24 an anti-cigarette advocate.

25 Q. A what?

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1 A. An anti-cigarette advocate.

2 Q. You told me you had a bias and that you came
3 back to neutral?

4 A. That's right. And I do believe that there
5 should be controls, yes. Strong controls.

6 Q. On cigarettes?

7 A. I think the State of Minnesota should, in fact,
8 be more vigorous in enforcement of its laws.

9 Q. Okay.

10 A. That's my personal opinion.

11 Q. Yeah. Thanks.

12 Look at page seventeen, it says the
13 Tobacco Institute now -- and you understand that that
14 was now an entity formed by Hill and Knowlton and all
15 the tobacco companies?

16 MR. PURVIS: Object to the form of the question.

17 THE WITNESS: I am aware of that.

18 BY MR. MANNING:

19 Q. They ran an ad captioned, "A Statement About
20 Tobacco and Health"; right?

21 A. Uh-huh.

22 Q. It said, "We recognize that we have a special
23 responsibility to the public -- to help scientists
24 determine the facts about tobacco and health, and
25 about certain diseases that have been associated with

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1 tobacco use."

2 A. Yes.

3 Q. They state they fully recognize a special
4 responsibility to you and me; right?

5 A. That's what it says there, yes.

6 Q. They also go on, then, in b, there, the last
7 sentence, to say, "We pledge continued support of
8 this program of research until all the facts are
9 known"; do you see that?

10 A. That's what it says, yes.

11 Q. And with that kind of a pledge of continued
12 support, you would never expect them to suppress
13 facts; right?

14 A. I would hope not.

15 Q. You'd never expect them to take scientists in
16 who were discovering things about cigarettes and
17 safety and other issues and burn the research, would
18 you?

19 A. I would hope not.

20 Q. You wouldn't expect them to fire people because
21 they were doing research in areas that they got
22 uncomfortable with?

23 A. I would hope not.

24 Q. Because, in fact, what they should do is do that
25 research and share it with the public health bodies,

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1 right?

2 A. I would hope they did.

3 Q. That's what they pledged to do, right?

4 A. That's what they pledged to do.

5 But as a historian, I have no evidence that they
6 did or didn't do that. Because I did not, in fact,
7 research that topic. That is not my topic of
8 research.

9 Q. I understand.

10 A. I wanted to make that very abundantly clear.

11 Q. Oh, you've made it abundantly clear.

12 And what I'm going to make abundantly clear at
13 the end of the deposition, just so you know, after we
14 read through this together again, once again, even
15 though you've already done it once on your own, --

16 A. Uh-huh.

17 Q. -- I'm going to ask you whether or not you will
18 broaden that question. Whether you have the
19 integrity, as an academician in this state to take it
20 on yourself to broaden that inquiry. I'm going to
21 ask you that. I'm not asking you now, but I'm just
22 going to tell you that I'm going to ask you that
23 later on.

24 MR. PURVIS: Object to the form of the
25 question.

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1 MR. MANNING: It's not a question.

2 MR. PURVIS: Then I object to the speech.

3 MR. MANNING: That's fine.

4 Objection noted. And then I'll stop there.

5 BY MR. MANNING:

6 Q. Paragraph twenty-eight, sir.

7 A. Twenty-eight?

8 Q. Yeah.

9 A. Okay.

10 Q. See it says, "Also, in 1970 the
11 Tobacco Institute ran an advertisement captioned,
12 "The question about smoking and health is still a
13 question"; do you see that?

14 A. I see that, yes.

15 Q. And in your historical analysis the question
16 about smoking and health was not still a question in
17 1970 at all?

18 A. Not at all.

19 Q. The fact is you phrased it before, beyond a
20 shadow of a doubt there was no question that smoking
21 caused cancer?

22 A. That is correct.

23 Q. Then, sir, if you go to page nineteen, under the
24 title "The Campaign of Deceit and
25 Misrepresentations"; do you see that?

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1 A. Uh-huh.

2 Q. Paragraph thirty, it says, "In actuality the
3 industry's promises of full disclosure and objective
4 scientific research were never fulfilled"; do you
5 recall reading that?

6 A. I'm reading it now. I don't recall back to that
7 time.

8 Q. "Instead, the trade associations -- dominated by
9 public relations officials and attorneys, as opposed
10 to independent scientists -- have served as industry
11 fronts in a campaign of deceit and misinformation
12 aimed at undermining the public perception of the
13 health risks of smoking"; do you see that?

14 A. I see that, yes.

15 Q. "Research was undertaken not in pursuit of the
16 scientific truth on smoking and health, but to aid
17 the industry in its public relations and litigation
18 battles. Research that might confirm the health
19 risks of smoking was concealed."

20 A. I see that.

21 Q. Do you recall reading that generally?

22 A. Yes, I do.

23 Q. Those were significant words, weren't they?
24 They charged this industry with something that was
25 deceitful; correct?

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1 A. That is correct.

2 Q. And misrepresenting the American and Minnesota
3 people?

4 A. That's what it says.

5 Q. And when you read that, again, you did not
6 broaden your research question?

7 A. No, I did not.

8 Q. Now, then you see down -- I'm not going to read
9 all of these any more.

10 A. Surely.

11 Q. Unless you want me to, I will.

12 But do you see where the next paragraph,
13 paragraph thirty-one, it quotes a document from a CTR
14 meeting -- Council Tobacco Research; right?

15 A. Yes.

16 Q. And was written in 1981. And the document
17 states, it's quoted, "When we started the CTR Special
18 Projects the idea was that the scientific director
19 would review a project. If he liked it, it was a CTR
20 special project. If he did not like it, then it
21 became a lawyers' special project"; do you see that?

22 A. I see that, yes.

23 Q. That sounded fairly outrageous, didn't it, when
24 you read it?

25 MR. PURVIS: Object to the form.

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1 THE WITNESS: I have no idea what procedures are
2 in industry-sponsored research. No, I do not.

3 BY MR. MANNING:

4 Q. None?

5 A. I have no idea what they are.

6 Q. Okay. So when you read that, you just thought
7 maybe that's industry procedure?

8 A. Could be.

9 Q. You thought maybe that's what all companies do?

10 A. Could be, yes.

11 Q. So that didn't strike you as outrageous at all?

12 A. Not at all.

13 Q. Then, sir, if you can please just read --

14 A. Pardon me?

15 Q. I said then, sir, if you could please turn to
16 page twenty-two?

17 A. Twenty-two?

18 Q. Yes.

19 And just read paragraph f, if you which, in its
20 entirety.

21 A. (Reviewing document.)

22 I've read it.

23 Q. Do you see that it's a quote from a tobacco
24 document -- tobacco company document, sir?

25 A. I see it as a quote, but it doesn't say where

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1 it's from.

2 Q. Did you read that -- do you recall reading
3 something to this effect when you read the complaint
4 back in --

5 A. I couldn't say, but I assume I did, yes.

6 Q. And it ends by saying, it's important that the
7 public -- "In the cigarette controversy, the
8 public -- especially those who are present and
9 potential supporters -- must perceive, understand,
10 and believe in evidence to sustain their opinions
11 that smoking may not be the causal factor"; do you
12 see that?

13 A. I see that, yes.

14 Q. And when you read that did you conclude that
15 it's very possible that the tobacco companies were
16 making statements that it was not -- smoking was not
17 causative of cancer?

18 A. One can assume from that statement that that's
19 what they were doing, yes.

20 Q. And one can assume from that internal document
21 that they knew that it was a strategy that was a
22 whole new strategy, that was not a vehicle for
23 victory?

24 A. That's what it states.

25 Q. Right.

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1 And one can also assume from that document, it's
2 fairly clear, that it's not the truth, to say that it
3 wasn't causally related?

4 A. That -- the fact -- that what -- that the
5 causative question?

6 Q. The fact that they're going to continue to state
7 to people that they -- and hope that people will
8 perceive, understand, and believe in evidence to
9 sustain their opinions that smoking may not be the
10 causal factor, it's sustaining a falsehood?

11 A. Sustaining a falsehood as then perceived, yes.

12 Q. I'm going to ask you to turn to page
13 twenty-five, sir.

14 A. Uh-huh.

15 Q. See paragraph forty-two there, please?

16 A. Yes.

17 Q. Just read it in its entirety there and over --

18 A. Going into the next page?

19 Q. Yes, please.

20 A. Okay.

21 (Reviewing document.)

22 MR. MONICA, JR.: While we are reading, can we
23 have a time check, please?

24 (Discussion had off the record.)

25 MR. PURVIS: For the record, the reporter has

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1 indicated that we've been going now for five hours
2 and fifty-seven minutes. And I believe the witness
3 is willing to continue on further this afternoon, if
4 counsel so desires.

5 MR. MANNING: Completely your -- the witness's
6 and your discretion. Totally your call.

7 Start tomorrow morning whenever you say.

8 I mean I don't want to go -- I don't want to go
9 today much beyond 6:00.

10 MR. PURVIS: I think --

11 THE WITNESS: That's fine.

12 MR. PURVIS: -- we're looking closer to 5:00 or
13 5:30.

14 MR. MANNING: Whatever is your call.

15 THE WITNESS: Yes, I have read paragraph
16 forty-two.

17 BY MR. MANNING:

18 Q. Thank you.

19 And you recall reading something to that effect
20 back in the -- I keep missing this -- I think the
21 fall of '94?

22 A. '95. Whatever. About the start of this.

23 Q. Right.

24 A. But any -- do I remember -- I don't have any
25 recollection specifically of this, but it does not --

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1 it would not be wrong to state that I have read it,
2 yes.

3 Q. The subject of a safer cigarette was not
4 something that was -- I mean that's not brand new to
5 you as we sit here today?

6 A. No.

7 Q. And you either became aware of that through
8 reading this complaint or the Kluger book?

9 A. That's correct.

10 Q. One of the two sources?

11 A. Yeah. One of the two sources.

12 Q. Or both?

13 A. Or both.

14 Q. And have you asked anybody any questions about
15 what the activity of the tobacco companies were to
16 kill a safer cigarette?

17 A. No.

18 Q. You would not expect a company that had pledged
19 itself to the health of the American people to do
20 whatever it could to, in fact, kill a cigarette that
21 may be safer, would you?

22 A. I would hope they wouldn't.

23 Q. By this document does it appear, at least by the
24 document, that the lawyers were pretty heavily
25 involved in all of these -- in the decisions with

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1 respect to a safer cigarette?

2 A. So the document says.

3 Q. Then if you look over on page twenty-seven,

4 paragraph forty-five.

5 A. Forty-five?

6 Q. Yeah.

7 A. Yes.

8 Q. Do you see where it's now talking about here the

9 smokeless cigarette, Premier. And then it says,

10 "The Shook, Hardy attorney wrote that the smokeless

11 cigarette could have significant effects on the

12 tobacco industry's joint defense efforts and that the

13 industry's position has always been that there is no

14 alternative design for a cigarette as we know them.

15 The attorney also noted that unfortunately the

16 Reynolds' announcement seriously undercuts this

17 component of industry's defense"; do you see that?

18 A. I see it.

19 Q. You know Mr. Purvis is from Shook, Hardy?

20 A. Yes, I do.

21 Q. And do you recall reading this back at the time

22 you first got involved?

23 A. I don't recall the specific item. But I'm sure

24 I must have read it. If it were in that original

25 report -- complaint.

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1 Q. And you've not asked him, "Well, you know,
2 Mr. Purvis, why don't you get me the documents from
3 your own law firm," --

4 A. No.

5 Q. -- "that your own lawyers have written. Just
6 give me those, so I could read them to see whether or
7 not this question that I'm researching on behalf of
8 the tobacco companies ought to be broadened"; you
9 didn't even do that, did you?

10 A. Not at all. Because I'm not interested in what
11 the tobacco companies did or did not do. That is a
12 research project for some other historian, perhaps in
13 this case, I'm not sure. Or some other time. Or a
14 historian that you would engage, perhaps. I have no
15 idea.

16 Q. Is that your understanding of how it works?
17 That -- that we, the State of Minnesota, would have
18 to engage a historian? That we, the State of
19 Minnesota --

20 A. I have no idea.

21 Q. -- cannot expect a historian to render an
22 objective opinion and do an objective analysis based
23 on an objective issue?

24 MR. PURVIS: Object to form.

25 THE WITNESS: All historians give an objective

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1 opinion, an objective analysis, if they're
2 functioning as a historian. And that's exactly what
3 I'm doing here.

4 BY MR. MANNING:

5 Q. I understand.

6 Now I'm going to ask you to turn to page
7 thirty-two, please?

8 A. Thirty-two?

9 Q. Thirty-two.

10 A. (Complying.)

11 Q. There's a reference here to Addison Yeaman, who
12 was then the general counsel of Brown & Williamson,
13 who offered some of the most critical memorandum. He
14 subsequently became director of CTR. It says,
15 "Yeaman wrote in a 1963 analysis that: a) Nicotine
16 is addictive. b) We are, then, in the business of
17 selling nicotine, an addictive drug. c) Cigarettes
18 cause or predispose lung cancer. d) They contribute
19 to certain cardiovascular disorders. e) They may
20 well be truly causative in emphysema, et cetera."

21 Fifty-eight, it goes on, "Yeaman suggested that
22 Brown & Williamson accept its responsibility and
23 disclose the hazards of cigarettes to the surgeon
24 general."

25 To your knowledge cigarette companies didn't

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1 follow Mr. Yeaman's advice, did they?

2 A. I don't know whether they did or not.

3 Q. You don't -- as you sit here today, you as a

4 historian, have no knowledge whether the cigarette

5 companies disclosed to the surgeon general that

6 nicotine is addictive, that they're in the business

7 of selling an addictive drug, that it causes lung

8 cancer, that it contributes to cardiovascular

9 disease, and causes emphysema? You don't -- you

10 don't know whether the tobacco companies ever said

11 those five things to the surgeon general, do you?

12 A. It does not appear in the '64 surgeon general's

13 report that they did.

14 Q. Yeah.

15 A. That's the only way I can answer that question.

16 Q. Sure.

17 A. I don't know what they did outside of that.

18 Q. I understand.

19 And it would appear, by at least this portion of

20 this document, that they didn't follow Mr. Yeaman's

21 advice; right?

22 A. On the basis of the '64 surgeon general's

23 report, yes.

24 Q. Yes, they did not disclose?

25 A. Yes, they did not disclose. Yes.

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1 Q. So you did read, as you've indicated, and I'm
2 just saying this by way of context, then, the entire
3 complaint that you had back in the fall of '95 or the
4 spring of '95?

5 A. That's correct.

6 Q. And whatever was it in by way of quotations from
7 documents, and we've read some samples of those, you
8 read?

9 A. Yes.

10 Q. And you were aware, then, at that time, that
11 there were some very serious charges being made
12 against these tobacco companies?

13 A. Yes.

14 Q. Charges of fraud; right?

15 A. I don't recall the word fraud in this
16 statement. Could be.

17 Q. You don't recall that word?

18 A. No.

19 It could be.

20 Q. Charges of lying?

21 A. By indirection it's there, yes.

22 Q. You don't recall that it was specifically there?

23 A. I don't recall. It may be there, but I don't
24 recall it, yes.

25 Q. You recall that at least it was implied or

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1 indirectly it was there that they were lying?

2 A. Yes.

3 Q. Do you recall that it was at least implied or
4 directly there that they were manipulating public
5 opinion?

6 A. So it's stated, yes.

7 Q. And they had been engaged in the manipulation of
8 public opinion for a long period of time; you saw
9 that?

10 A. So the complaint alleges, yes.

11 Q. And you knew that the question that you were
12 going to research to some degree involved public
13 opinion?

14 A. Yes.

15 Q. And so you knew specifically that the charges in
16 this complaint impacted narrowly the question that
17 you were going to research?

18 A. Only in a very narrow way.

19 Q. Public opinion?

20 A. Yes.

21 Q. To the degree that these companies manipulated
22 public opinion, it surely would impact it?

23 A. Yes.

24 Q. And that's not taking into account in your
25 report? It can't be because you --

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1 A. Well, no, it's -- what do you mean by not taken
2 into account?

3 I took into account, in my report, what in fact
4 the historical record -- public historical record
5 showed. That is what the people had before them.
6 Not what was in hidden files, hidden archives, that
7 subsequently were revealed as a result of this
8 litigation.

9 Q. All right.

10 A. I looked at the public record, period.

11 Q. To the degree that the tobacco companies were
12 manipulating and impacting public opinion, you did
13 not undertake any research to determine how they were
14 doing that, if they were doing that, to what degree
15 they were doing that, and on and on; correct?

16 A. No. That's correct.

17 (Exhibit 3137 marked for identification.)

18 BY MR. MANNING:

19 Q. Now, sir, I want to show you what's been marked
20 as Deposition Exhibit Number 42; correct?

21 A. It's marked 3137.

22 Q. Yep. That's great, thanks.

23 What is it marked again? 3137?

24 A. That's my copy.

25 Q. Yeah, you're right. You're right. Thanks.

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1 Now this is a letter, is it not, sir, written by
2 Mr. Cowan, you can see on the fifth page, who is the
3 president to Gerald Long, the Executive
4 Vice President of R.J. Reynolds, in May of '91;
5 right?

6 A. Yes.

7 Q. I'm going to read to you some portions of the
8 document and ask some questions. So if you want to
9 read the entire document you go right ahead.

10 A. Should I read it now?

11 Q. Whatever you want to do. Whatever you're most
12 comfortable with.

13 A. I'll read it now.

14 Q. Go right ahead.

15 A. (Reviewing document.)

16 Seems to be some kind of a problem here.

17 Oh, I see. Okay. Fine.

18 I've read the document.

19 Q. Sir, in this document --

20 You've never seen it before, right?

21 A. I've never seen this before.

22 Q. You are aware that I designated, prior to your
23 deposition, five days ago, a list of documents that
24 were sent to all your lawyers here saying that I
25 might show you these documents?

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1 A. I saw numbers -- list of numbers, which I
2 couldn't identify one way or another since I don't
3 know what the numbers refer to.

4 Q. Right.

5 And I'll represent to you that this was one of
6 those documents --

7 A. Fine.

8 Q. -- on that number, but you never saw it?

9 A. No. Never saw it.

10 Q. And it would appear to you -- you're used to
11 doing this kind of thing, looking at documents and
12 seeing what context -- and how they speak, right?

13 A. That's correct.

14 Q. So this is a letter by a Warren Cowan, who is
15 the president of Rogers & Cowan, a public relations
16 firm in Beverly Hills, California; right?

17 A. That's -- address, Wilshire Boulevard,
18 Beverly Hills, correct.

19 Q. And he's writing to Gerald Long, the Executive
20 VP at RJR, in Winston-Salem, North Carolina; right?

21 A. Yes.

22 Q. And he's wanting an increase to a hundred fifty
23 thousand dollar budget?

24 A. That is correct.

25 Q. For the next year?

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1 A. That is the operative cause for -- purpose of
2 the letter, it seems to me.

3 Q. Right. And he's kind of laying out in the
4 letter some of the things that they did for them in
5 the prior year?

6 A. That's what it says, yes.

7 Q. And he says his primary objective for the year
8 will remain, "...to have smoking featured in a
9 prominent way, especially when it is tied favorably
10 with celebrities"; do you see that?

11 A. Yes, I have.

12 Q. Now, when you read this did you compare -- when
13 you read that, do you remember what the advertising
14 code said that they voluntarily agreed to in 1964?

15 A. I don't recall the specifics of the details, but
16 I recall the general kind of content, yes.

17 Q. You do recall that at least by this time in 1981
18 there wasn't supposed to be TV advertising of
19 cigarettes?

20 A. No TV advertising, that is correct.

21 Q. So this would appear to be a relatively cute way
22 to get around that ban, doesn't it, to hire a PR firm
23 to put cigarettes in the hands of prominent people on
24 talk shows and on and on, doesn't it?

25 THE WITNESS: Yes.

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1 MR. PURVIS: Object to the form.

2 BY MR. MANNING:

3 Q. Pardon me?

4 A. I think it's a way of getting in front of the
5 public, yes.

6 Q. Sure.

7 And it would also appear to be a way of
8 circumventing the restriction on advertising on
9 television, doesn't it?

10 A. I would not know whether that would be the
11 purpose. But the purpose to make it more glamorous,
12 perhaps. But circumventing advertising, I wouldn't
13 know that.

14 Q. You wouldn't know that?

15 Now, do you know that what the cigarette
16 advertising code said about making things more
17 glamorous through sex appeal and on and on?

18 A. I don't recall the specifics.

19 Q. You just don't remember that?

20 A. No.

21 Q. So you can't make a determination, as a
22 historian here, about how this type of correspondence
23 relates to the cigarette advertising code?

24 A. Not at all.

25 Q. Because you didn't analyze the cigarette

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1 advertising code in detail?

2 A. That is correct. In addition to which I do not
3 know the context of this letter. What preceded it,
4 what followed it. I don't know what the relationship
5 was of Roger and Cowan to Mr. Long or to the
6 company. I don't know what followed it. What was --
7 actions were taken, if any.

8 And, furthermore, it's not of interest to me,
9 since it's not a major subject that I was concerned
10 with in the historical research.

11 Q. We'll see if it ever does become of interest to
12 you as we talk about it, okay?

13 A. Sure.

14 Q. Look at the fourth paragraph. It says --

15 A. On the first page?

16 Q. It does tend to tell you about their
17 relationship, like correspondence does; right?

18 It says, "We believe our first year produced
19 some excellent results in many different areas to
20 help accomplish the objective. Briefly, these
21 activities include..." And it goes on. Putting
22 cigarettes in film strips; right?

23 A. Yes.

24 Q. In films, with movie stars; right?

25 A. That's what Mr. Cowan says, yes.

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1 Q. Like Burt Reynolds, and Farrah Fawcett, and
2 Marsha Mason; right?

3 A. That's what Mr. Cowan writes.

4 Q. And you have some general understanding that
5 these are films that appeal to people who are under
6 eighteen years old? Do you understand that?

7 A. I have no way of knowing which of these films
8 actually appeal to under eighteen and which appeal to
9 people over age eighteen.

10 Q. How about "Blowout" with John Travolta? Do you
11 have an understanding that that would appeal --

12 A. I've never heard of that.

13 Q. Never heard of that one? So you wouldn't
14 understand whether that would appeal to anyone under
15 eighteen, right?

16 A. I have no way of knowing.

17 Q. No problem.

18 A. The "Jazz Singer" probably would not. I mean
19 about a Jewish cantor who becomes a jazz singer is
20 not a major theme that would be of appeal to people
21 under eighteen.

22 "Cannonball Run" I've never heard of.

23 Q. You also see that they encourage smoking there
24 on page two on the television talk shows; right?

25 A. That's what it says in the letter, yes.

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1 Q. It talks about their promotional work in Europe
2 at the Cannes Film Festival that they could do;
3 right?

4 A. That's what the letter says.

5 Q. Appear to have wide-ranging context--to the film
6 industry, television, television talk show, various
7 other things; correct?

8 A. That's what Mr. Cowan claims.

9 Q. He talks about the -- page three, the Ebony
10 Fashion Fair; right?

11 A. Page three? I'm sorry?

12 Q. Page three, in the third paragraph, he talks
13 about the Ebony Fashion Fair, in which they think
14 their services could be helpful; right?

15 A. I'm sorry. Where on page three?

16 Q. Third paragraph.

17 A. Third?

18 Q. Begins, "In this vein..."

19 A. "In this vein..."

20 Okay. Right. Okay. Go ahead.

21 Q. Talking about the Ebony Fashion Fair there;
22 right?

23 A. The Ebony Fashion Fair, yes.

24 Q. Which their services could be helpful; right?

25 A. That's what it says.

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1 Q. Then they're talking about their conversations.

2 They've already spoken with James Caan about the

3 Winston rodeo program; right?

4 A. That's what it says, yes.

5 Q. Then you see on the next page where they talk

6 about Zsa Zsa Gabor.

7 A. Sorry?

8 Q. Down in the fourth paragraph on the bottom.

9 A. Fourth paragraph on page?

10 Q. Four.

11 A. Page four.

12 Q. Right before the end?

13 A. The Lucille Ball Backgammon, that one?

14 Q. Correct.

15 A. Pardon me?

16 Q. Yes.

17 A. Yes. Go ahead.

18 Q. "During the last few days we have been able to

19 get Zsa Zsa Gabor and Harold Robbins..."

20 Down two more.

21 A. In the last -- oh during. I see. Okay. Yes.

22 I see that.

23 Q. Were you aware before today that the tobacco

24 companies hire public relations firms to work in

25 Hollywood with TV shows and films in an effort to

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1 promote tobacco smoking? Were you aware of that?

2 A. I've seen --

3 MR. PURVIS: Object to the form.

4 THE WITNESS: I've seen such statements made,

5 yes.

6 BY MR. MANNING:

7 Q. Where? In the complaint?

8 A. No.

9 Q. Where?

10 A. May have been in the complaint, but I've seen
11 it, you know, in general accounts. General
12 discussion.

13 Q. This is the first time you've seen the specifics
14 on that?

15 A. Letter of this kind.

16 Q. So it confirms for you in your mind that that
17 kind of activity was in fact taking place in 1981?

18 A. I assume it was.

19 Q. And you surely interpret this letter as an
20 attempt by this public relations firm to promote
21 smoking in whatever way it can; correct?

22 A. I would think so, yes.

23 Q. And the tobacco industry is paying a hundred
24 fifty thousand dollars or this is a proposal to pay a
25 hundred fifty thousand dollars to this one firm, one

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1 company, to this one firm in LA, in that year, for
2 this specific targeted message?

3 MR. PURVIS: Object to the form.

4 BY MR. MANNING:

5 Q. Correct?

6 A. That's what it says.

7 (Exhibit 3138 marked for identification.)

8 BY MR. MANNING:

9 Q. Sir, showing you what's been marked as Document
10 3138, do you see that it's from a D.S. Burrows to a
11 Mr. L.W. Hall, Junior, October 6, '92?

12 A. That's what it says on the --

13 MR. PURVIS: Correction. I believe it's '82.

14 MR. MANNING: 1982. I'm sorry if I misspoke.

15 Thank you.

16 BY MR. MANNING:

17 Q. And the re on it is, "NBER Models of Price
18 Sensitivity By Age and Sex"; correct?

19 A. Uh-huh.

20 Q. Right?

21 A. That's what it says.

22 Q. I'm going to turn to the second page, if you
23 will, under "Conclusions"; okay? Do you see where it
24 says, "But the loss of younger adult males and
25 teenagers is more important to the long-term, drying

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1 up the supply of new smokers to replace the old.
2 This is not a fixed loss to the industry--its
3 importance increases with time. In ten years
4 increased rate per day would have been expected to
5 raise this group's consumption by more than 50%"; do
6 you see that?

7 A. That's what it says.

8 Q. If you then turn to the next page. Do you see
9 where it says, "Importance of Price Impact by Age/Sex
10 To Total Industry"; do you see that?

11 A. Attachment A?

12 Q. Yes, sir.

13 A. Yes.

14 Q. Do you see under the "1982 Importance to
15 Industry," the first category is
16 "Teenagers 12 to 17"?

17 A. Yes.

18 Q. Then it analyzes them in some numbers there,
19 doesn't it?

20 A. That it does.

21 Q. Percent of smokers. Rate per day. Importance
22 equals percentage of total consumption. Do you see
23 that?

24 A. I do.

25 Q. It does another analysis by age group, but one

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1 of the three age groups analyzed is teenagers twelve
2 to seventeen; correct?

3 A. Yes.

4 Q. And then under Roman Numeral Number II,
5 "Importance to Price Impact," those same teenagers
6 are analyzed once again; correct?

7 A. That's what it shows.

8 Q. Is this the first time, sir, that you have seen
9 a tobacco company document that specifically is
10 discussing teenagers?

11 A. This is the first time and only time. If this
12 is, in fact, a tobacco company document. I have no
13 way of knowing what this is.

14 Q. Okay.

15 A. I have no idea who Mr. Hall is, who Mr. Burrows
16 is. What NBER Models Of Price Sensitivity are.
17 Or -- I have no way of knowing the providence of this
18 document, which is one thing that we historians have
19 to do.

20 Q. Sure.

21 And so if it was just one document, out of all
22 the millions of documents in the depository, and
23 there was only one that talked about teenagers,
24 twelve to seventeen, then it may take on less
25 prominence. But if there were lots of them in --

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1 from every company, that talked about them, then it
2 might take on more prominence; right?

3 A. Not to me. For this particular historical
4 research.

5 Q. Oh, for the question you've asked, for your
6 report, this wouldn't even be important, would it?

7 A. No.

8 Q. Because it has nothing to do with the knowledge
9 of Minnesotans, --

10 A. Exactly.

11 Q. -- does it?

12 But it does tell you that at least in 1982 --
13 and I'll represent to you it's a tobacco company
14 document, okay? Produced by them, not by us.

15 A. I'll accept your statement.

16 Q. Thank you.

17 Now, with that fact in front of you, it at least
18 is evidence that there is a tobacco company who is
19 studying teenagers to some degree; correct?

20 A. According to this document, yes.

21 Q. Yeah. And then, if you go back here, on page
22 eight of the document, --

23 A. Page eight?

24 Q. Yes, sir.

25 A. Yes.

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1 Q. "NBER Price Elasticities Among Youth 12 to 17";
2 do you see that?

3 A. I do.

4 Q. It says, "The Fairness Doctrine was also found
5 to have an important negative effect during its first
6 year, accounting for a three percentage point drop in
7 twelve to seventeen incidence."

8 Do you know what the Fairness Doctrine is?

9 A. I have no idea.

10 Q. So in your historical analysis, that you did
11 of -- that you previously described, and I won't
12 summarize or characterize. You have uncovered
13 nothing or ever learned what the Fairness Doctrine
14 is; correct?

15 MR. PURVIS: Object to the form.

16 BY MR. MANNING:

17 Q. You never heard of it?

18 A. Oh, I wouldn't say I never heard of it. I may
19 have, but I don't recall it at the present time.

20 Q. You don't know what it is?

21 A. Not unless you define it for me, and then I
22 could tell you whether I've heard of it or not.

23 Q. You can't define it for me?

24 A. No. I have no idea what it means, right.

25 Q. So I realize this is not your question, which is

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1 the knowledge of the State of Minnesota, but to
2 backtrack, it's at least the first time in your
3 evolution in this work, in this case, where you have
4 physically seen a tobacco company document that talks
5 about twelve- to seventeen-year-old teenagers?

6 A. That is correct.

7 Q. Now you know that at least one such document
8 exists?

9 A. So this shows, yes.

10 THE WITNESS: May I take a break at this point?

11 Just a two-minute break. This is one of the --

12 MR. MANNING: I understand. Take your time.

13 (Recess taken.)

14 BY MR. MANNING:

15 Q. Sir, I'm going to show you what's been
16 previously --

17 A. Are we through with this one?

18 Q. Yes, sir.

19 Put that complaint aside there, too, if you'd
20 like.

21 A. Okay.

22 Q. Make your life easier.

23 I'm going to show you what's been previously
24 marked as Plaintiffs' Exhibit 1031, okay?

25 A. 1021, yes.

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1 Q. I -- I'm seeing 1031. Am I wrong?

2 A. 1031. Oh yes, I see that right now. Yes.

3 Q. Good.

4 And the title of that document is "Strategic
5 Research Report," right, by RJR?

6 A. That's what it says there on the cover page,
7 yes.

8 Q. February 28, 1984?

9 A. Yes.

10 Q. Right?

11 It's from a Diane --

12 A. February 29, 1984.

13 Q. From Diane Burrows, right?

14 A. Diane S. Burrows, From. Yes.

15 Q. The title of the document is "Younger Adult
16 Smokers: Strategies and Opportunities"; right?

17 A. So it says.

18 Q. If you turn to the next page, the Abstract here,
19 and the document says, "Younger adult smokers are
20 shown to be critical to long-term brand company
21 growth in the past, present, and future"; right?

22 A. That's what it says, yes.

23 Q. "Younger adult performance of the six major
24 brands of the last half century was identified to
25 find" --

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1 "Was" --

2 A. Was analyzed.

3 Q. "...analyzed to find four common
4 strategies/circumstances leading to their younger
5 adult strength. They capitalized on: Changes in
6 external factors"; right?

7 A. That's what it says, yes.

8 Q. "2: Growth sectors among young adult smokers"?

9 A. Yes.

10 Q. "3: Out-of-touch competitors"?

11 A. It's so written, yes.

12 Q. And "4: Product mildness, communicated
13 positively."

14 A. So it says, yes.

15 Q. "Key recommendations include: 1) Establishment
16 of a separate younger adult smoker program unit with
17 customized procedures, measures, improved information
18 resources, and a less competitor-centered focus";
19 right?

20 A. That's what it says.

21 Q. Then it says, "2) Attention to Blacks,
22 Hispanics, females, social acceptability, pricing,
23 and potential enhancement of product acceptability";
24 right?

25 A. That's what it states here.

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1 Q. Do you know what Diane Burrows was referring to
2 when she said younger adult smoker in this document?

3 A. No, I do not.

4 Q. I'm going to ask you to turn now -- the next
5 page is the table of contents.

6 A. Uh-huh.

7 Q. We'll move beyond that to the next page, which
8 is the Management Summary.

9 A. Yes.

10 Q. The "Purpose" and underneath that there's "The
11 Importance of the Younger Adult Smoker"; right?

12 A. Yes.

13 You asked previously what was referred to as
14 younger adult smoker. In the first paragraph it
15 identifies them as 18- to 24-year-olds.

16 Q. Great.

17 A. Is that correct?

18 I can't ask a question. Sorry.

19 Q. I see that statement there, in brackets; right?

20 A. Yes. Statement in brackets. Right.

21 Q. We'll move on.

22 A. Uh-huh.

23 Q. At the two bullet points it says down there
24 under "The importance of younger adult smokers": --

25 A. Yes.

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1 Q. -- "The renewal of the market stems entirely
2 from eighteen-year-old smokers"; right?

3 A. That's what it says.

4 Q. "No more than 5% of smokers start after age
5 twenty-four"?

6 A. That's what it says.

7 Q. "The brand loyalty of eighteen-year-old smokers
8 far outweighs any tendency to switch with age"?

9 A. That's exactly what it says there.

10 Q. "Thus, the annual influx of eighteen-year-old
11 smokers provides an effortless momentum to successful
12 first brands." And then there's a star or an
13 asterisk; right?

14 A. Uh-huh.

15 Q. Says "i.e." at the bottom. "Those which appeal
16 to eighteen-year-old smokers rather than switchers,
17 ages nineteen to twenty-four"?

18 A. That's what it says here.

19 Q. So now it would appear they're narrowly
20 targeting just the eighteen-year-old group; right?

21 A. That's what it says here, yes.

22 Q. "Marlboro grows by about .8 share points per
23 year due to eighteen-year-old smokers alone"; do you
24 see that?

25 A. I see it.

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1 Q. I'm going to go to the next page, if you will.

2 A. (Complying.)

3 Q. Under the title, "Successful Younger Adult Brand

4 Strategies of the Past": A review of the five key

5 brands in the last half century -- Pall Mall,

6 Winston, Marlboro, Kool, and Newport -- shows that

7 each built considerable strength among young adult

8 smokers well ahead of its upsurge in market share.

9 Their strategies succeeded almost invisibly, hidden

10 from competitors in the critical but low-volume

11 younger adult smoker market"; do you see that?

12 A. Yes, I do.

13 Q. The last two bullet points, if you will, on that

14 page?

15 A. The last two?

16 Q. Yes.

17 A. Yes.

18 Q. "In every case, the major younger adult brands

19 have been succeeded by a brand which was positioned

20 to be different from its predecessor and better

21 in-touch with the younger adult smokers of the time.

22 Me-too strategies have never worked."

23 Next one. "All of these successful brands have

24 stressed positive product messages, as opposed to

25 problem/solution and have provided milder/smoothier

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1 product delivery than their predecessor"; right?

2 A. I've seen that. Yes, it's so stated here.

3 Q. If you go over to "Implications/Recommendations

4 For RJR"; will you just read number one?

5 A. Number one?

6 Q. Yes.

7 Just read it to yourself.

8 A. (Reviewing document.)

9 Yes, I have read number one.

10 Q. Based on your review of this document so far, at

11 least, you would agree that in 1984 RJR is -- and

12 Diane Burrows at RJR is writing a document that

13 underscores the importance of the young adult smoker?

14 A. Diane Burrows so indicated, yes.

15 Q. And it's also clearly focusing on the

16 eighteen-year-old person; correct?

17 A. The document shows that, yes.

18 Q. If you can turn then, to the next page, titled,

19 "Younger Adult Smokers: Strategies and

20 Opportunities" "Introduction." Do you see that?

21 A. I'm sorry?

22 Q. Maybe the next one.

23 A. Which page number? Oh yes, I have it here.

24 Q. There's not a number on it.

25 A. I have it.

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1 Q. That's all right. Introduction there, see?

2 A. Right. Uh-huh.

3 Q. The last sentence of the first paragraph.

4 "Furthermore, if we are to compete effectively, we
5 must recognize the imperative to know and meet the
6 wants of those who are eighteen and have already
7 elected to smoke, as well as those of older smokers";
8 do you see that?

9 A. Yes, I do see that.

10 Q. Now, when they say those who are eighteen and
11 have already elected to smoke, you would agree a fair
12 interpretation of that is that some may have elected
13 to smoke prior to eighteen?

14 A. One would assume that, yes.

15 Q. Now, sir, I'm going to ask you to turn way back
16 in the document.

17 A. To?

18 Q. If you look at the pages on the right hand, at
19 the bottom, they're numbered 50192.

20 A. Yes.

21 Q. 8526.

22 A. 8526?

23 Q. 8526 I'd like you to go to.

24 A. 8526. Yes.

25 Q. And you see that graph there at the top of the

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1 page on -- entitled "Appendix B"? 50192 8526?

2 A. Yes.

3 Q. Right-hand column says percentage; right?

4 A. The right-hand column -- the left-hand column.

5 Q. I'm sorry. Thank you. The left-hand column.

6 It's a little late. I misspoke.

7 A. Yes.

8 Q. Says percent; right?

9 A. Yes.

10 Q. And the bottom says age; right?

11 A. That's correct.

12 Q. And the age starts with thirteen and goes all the way to twenty-four, doesn't it?

14 A. That's what the graph so shows, yes.

15 Q. Yeah.

16 And then there's a bullet point right below that graph that says, "More than two-thirds of male smokers start by age eighteen"; do you see that?

19 A. Yes, I do.

20 Q. Gives the percent at thirteen, fourteen, fifteen, sixteen -- sixteen and seventeen are very high, aren't they?

23 A. Sixteen?

24 Q. Age sixteen and age seventeen.

25 A. Age sixteen and seventeen? I can't read the

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1 percentage figures on the left, they're not very
2 clear. But it looks to me as if it's about thirteen
3 percent. Little less than thirteen percent.

4 Q. Okay. But as to the relative, in relationship
5 to the other graph, they're the highest, sixteen to
6 seventeen?

7 A. Yes.

8 Q. And eighteen there's a decline?

9 A. Eighteen is next highest, yes.

10 Q. Nineteen and twenty it tapers off dramatically?

11 A. That is correct.

12 Q. Up to twenty-four?

13 A. Yeah. That's what the graph shows.

14 Q. Yes. And so it would appear to be, at a
15 minimum, a graph that's focusing in some way, shape,
16 or form, on behavior of teenagers, doesn't it?

17 A. Smoking behavior.

18 Q. Yes.

19 A. Yes.

20 Q. And it would appear in this large document on
21 "Strategic Research Report," titled "Younger Adult
22 Smokers: Strategies and Opportunities," at a minimum
23 you, as a historian, would conclude on review of this
24 graph, that it's this information that they want to
25 review, that it has some importance to them?

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1 A. I'm not a corporate historian or a company
2 historian, but I would assume that that's something a
3 company would be interested in, yes.

4 Q. Right.

5 A. And, therefore, my response would not be as a
6 historian, but just as an ordinary person.

7 Q. All right. And as a historian you don't know
8 whether or not by this point in time in 1984 that RJR
9 had made it a policy that whenever they spoke about
10 kids, they always just started at eighteen, they
11 didn't speak about them younger?

12 A. I have no knowledge about that.

13 Q. Nobody's ever talked to you about that before?

14 A. No.

15 Q. And you've not asked about it?

16 A. No.

17 Q. Now this is the second document that you've seen
18 in which there's at least some focus by the tobacco
19 industry on teenagers; correct?

20 A. That is correct. Both of them I've seen this
21 afternoon.

22 Q. Correct.

23 A. Which you've shown me.

24 Q. Right.

25 A. Are we through with that one?

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1 Q. Yes.

2 I show you, sir, what's been marked as

3 Plaintiffs' Exhibit 1038, okay?

4 A. Okay.

5 Q. You've never seen that document before, have
6 you?

7 A. Pardon me? No.

8 Q. You've never seen this before, have you?

9 A. No, not at all.

10 Q. This document is titled, a "Marketing
11 Development Intelligence Center", the "MDIC"; right?

12 A. The cover page indicates that, "MDIC." Yes.

13 Q. And the date on this, at least by those two
14 signatures -- one of them is 1/17/85 and the other is
15 5/9/85; right?

16 A. That's in the lower left-hand corner, so those
17 dates do appear.

18 Q. And then the next page is a document called
19 "RJR" and it's marked "Confidential"; right?

20 A. That's correct.

21 Q. And there's a box that says "Question" and the
22 question is, "Are Younger Adult Smokers Important?"

23 A. Yes. Indicated there. Yes.

24 Q. Now, let's turn to the next page.

25 A. (Complying.)

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1 Q. Have you ever heard the word FUBYAS,
2 F-U-B-Y-A-S?

3 A. What language is that, sir?

4 Q. Just look at it here in the document.

5 A. (Complying.)

6 Q. Have you ever heard that word, FUBYAS?

7 A. No.

8 Oh, it's an acronym. I see.

9 Q. I suppose you might say it's tobacco language.

10 A. It may be tobacco language.

11 Q. Internal document tobacco language.

12 A. But it's actually an acronym for a phrase. I
13 see that, yes.

14 Q. Right. And you see what that phrase is, First
15 Usual Brand --

16 A. In the parenthesis it so indicates, yes.

17 Q. First Usual Brand Younger Adult Smoker?

18 A. That's what it says.

19 Q. And you, as a historian, this is the first time
20 you're ever aware that tobacco companies have ever
21 used the word FUBYAS?

22 A. That is correct.

23 Q. Or targeted, or looked at, or studied a first
24 usual brand of younger adult smokers?

25 A. Yes.

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1 Q. This is the first time you were ever aware of
2 it; right?

3 A. Yes.

4 Q. And it says here that FUBYAS are "Those younger
5 adults who are already smokers but have reached the
6 stage of choosing a first usual brand"; right?

7 A. That's what it says, yes.

8 Q. And then it goes on there and says, "FUBYAS, not
9 switchers, have driven the success of the key brands
10 of this century. They are leading indicators of
11 growth and decline"; do you see that?

12 A. I do.

13 Q. Next page.

14 A. (Complying.)

15 Q. "Strong performance among FUBYAS is critical to
16 long-term share in the total market."

17 Next bullet. "Although switching can be
18 important in the near-term market, loyalty and thus
19 FUB smokers are the driving force over the
20 long-term"; right?

21 A. That's what it says, yes.

22 Q. Pretty strong language, isn't it? It's a
23 recognition by this company that First Usual Brand of
24 Young Adult Smokers is critical to their economic
25 success; right?

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1 A. I have no idea whether that's strong, weak, or
2 normal type of language used in these types of
3 reports. I don't see these kinds of reports.

4 As a historian, I'm not a historian of corporate
5 America and, therefore, I don't look at these kinds
6 of reports.

7 Q. But, in fact, historians do review corporate
8 America?

9 A. Pardon me?

10 Q. Historians do review corporate America?

11 A. Oh certainly.

12 Q. Sure.

13 In fact, historians write corporate histories
14 for corporations?

15 A. Absolutely.

16 Q. You have colleagues that have been hired by
17 major Fortune 100 companies, paid thousands of
18 dollars to come in and write a hundred-year history
19 of the company?

20 A. Absolutely.

21 Except I don't do that.

22 Q. But you know that it can be done?

23 A. Oh certainly.

24 Q. You could do it?

25 A. Oh, I could.

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1 Q. Right. If someone --

2 A. But I'm not fully qualified to because I haven't
3 been trained in corporate structures and corporate
4 history.

5 Q. But if someone came to you, to do that, somebody
6 might -- you might say, "Well, I'm not really
7 specifically trained in corporate history. I'm
8 trained in Early American history, but you know, your
9 company is two hundred years old and it spans some
10 history of America, and so I mean it doesn't scare
11 me. I'd be happy to do it. It's probably a finite
12 set of documents and, in fact, I can compare it, fit
13 it in to the rest of American history"; you could do
14 that, couldn't you?

15 A. Yes.

16 Q. You would tell them you're not a corporate
17 historian, but you wouldn't back away from the task?

18 A. They wouldn't approach me, but that's another
19 matter.

20 I'm a labor historian. I doubt if corporate
21 America would approach a labor historian.

22 Q. Because you've been on the side of labor?

23 A. That's correct.

24 Q. But assuming that that wasn't the case, that
25 there was some corporation that wanted to do that,

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1 and in fact had a large portion of their history that
2 was labor-intensive, they might choose you?

3 A. Certainly. I mean anything is possible.

4 Q. Right. And so this is exactly what you, as a
5 historian, would and could do, is undertake a review
6 of documents within a certain corporation?

7 A. Within the context of my expertise and what
8 I'm -- and the research design of the project that
9 I'm working on, yes.

10 Q. Okay.

11 A. Exactly.

12 Q. I'm going to ask you, then, to turn to page five
13 on page 6562.

14 A. 6562?

15 Q. 6562.

16 It's just about eight pages back.

17 A. Okay. Yes.

18 Q. There there's a graph of RJR compared to
19 Philip Morris; right?

20 A. Uh-huh.

21 Q. Philip Morris is taking off in the '60s, '70s,
22 and right into the '80s; correct?

23 A. Exactly. Exactly.

24 Q. RJR by '60, roughly '66, is starting to decline?

25 A. Let's see. Two, four, six -- say by '64. By

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1 '64, yes.

2 Q. Starting to --

3 A. According to the graph?

4 Q. Yes.

5 A. '64 is the peak year. It declines from then on.

6 Q. Do you know why this is so?

7 A. No.

8 Q. You could study that, though, based on review of
9 their documents?

10 A. But I have no interest in studying that.

11 Q. I understand you don't. But if...

12 Do you have any understanding of why this
13 Philip Morris line takes off in 1960 at all, as a
14 historian, based on your review of documents so far?
15 Any idea?

16 A. Not any historical knowledge of it. But general
17 overview, perhaps.

18 Q. What is that?

19 A. That they were able to market a successful brand
20 cigarette that just took off.

21 Q. And what was that?

22 A. I believe it was Marlboro.

23 Q. Okay. And that's your understanding when you
24 look at this graph?

25 A. Part of my understanding anyway, yes.

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1 Q. The next page --

2 A. But now I'm saying that not because I looked at
3 the documents and the historical research. This is
4 not my opinion as an expert in this case. This is my
5 general knowledge.

6 Q. Right.

7 A. Okay.

8 Q. I understand.

9 The next page is "Purpose," okay? "To build on
10 the learning from younger adult smoker opportunity
11 analysis." One, they want "To find concrete
12 principles and models for successful marketing
13 action"; right?

14 A. That's what it says.

15 Q. They want "To move from problem identification
16 to what we can do about it"; right?

17 A. That's what it says.

18 Q. They want an overall strategy, relevant on
19 target positionings, executional guidelines, and they
20 want to know how to reach them and catch their
21 interest?

22 A. That's what it says, yes.

23 Q. So far we've seen nothing, have we, in these few
24 documents that I've shown you, that says, "God, we've
25 got to tell the kids the truth about smoking," have

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1 we?

2 A. No.

3 Q. We've not seen anything that says, "Oh boy, we
4 are concerned about the kids. We've stated publicly
5 we're concerned. We're concerned about their
6 health. Let's make sure that we're doing nothing to
7 get the kids addicted"?

8 A. I've seen nothing in these documents to that
9 point.

10 Q. In fact, what we're seeing is something to the
11 contrary? We're seeing marketing efforts in these
12 documents that are targeted towards kids; correct?

13 MR. PURVIS: Object to the form.

14 BY MR. MANNING:

15 Q. Correct?

16 A. I assume that's what we're seeing.

17 I have not seen marketing reports. I don't know
18 what these marketing reports are. I have no way of
19 knowing what the providence of these are. I have no
20 way of knowing who saw this, what they did, how they
21 acted upon it, and what in fact was done. This --
22 I'm seeing this document for the first time --

23 Q. That's right.

24 A. -- and it's not part of the context of my
25 historical research.

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1 Q. I understand. We're just broadening your
2 historical research right here in your deposition,
3 you see. And so you're a historian and I'm asking
4 you about these documents that are beyond the
5 question you've identified, but the question we
6 believe is too narrowly defined, you see. So I can
7 do this and it's part of cross-examination.

8 A. Sure.

9 Q. Now the next document, next page. Turn it over,
10 if you would.

11 A. Next page?

12 Q. Yes.

13 It says, "Successful Marketing to Younger Adult
14 Smokers"; right?

15 A. I'm sorry. "To give insight into actions..." is
16 what I have for the next page.

17 MR. PURVIS: Do you have a page number?

18 MR. MANNING: I may have turned wrong.

19 BY MR. MANNING:

20 Q. Let's go to 6566.

21 A. Okay. I like that. I've got it now.

22 Q. Sorry.

23 A. Uh-huh.

24 Q. It says, "Successful Marketing to Younger Adult
25 Smokers"; right?

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1 A. Yes.

2 Q. Second bullet point, number two. It says, "Know
3 the target inside out. Market trends"; right?

4 A. That's what it says.

5 Q. And "Mindsets"?

6 A. That's what it says.

7 Q. Next page.

8 A. Uh-huh.

9 Q. "We Can Do It -- Others Did. Two Examples Of
10 Brands That Did It -- And How. Jack Daniels -- The
11 Marlboro of Bourbons. Expected Positioning and
12 Execution. Consistent, Long-term Marketing Effort";
13 do you see that?

14 MR. PURVIS: Excuse me. You misread the line,
15 it's "Unexpected positioning..."

16 MR. MANNING: Thank you.

17 BY MR. MANNING:

18 Q. "Unexpected Positioning and Execution.
19 Consistent Long-term Marketing Effort"?

20 A. Yes.

21 Q. Number two: "Budweiser -- Turning A Big Brand
22 Around"?

23 A. Yes.

24 Q. It would appear that they're going to study two
25 examples who have done this, Budweiser and

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1 Jack Daniels; right?

2 A. I have not studied Budweiser and Jack Daniels.

3 Q. They?

4 A. Oh they, yes.

5 Q. That's what it appears?

6 A. That's what they say. That's what they say
7 they're going to do.

8 Q. Right.

9 Now, sir, if you'll turn to page 6631.

10 A. 66 --

11 Q. 31.

12 A. 31?

13 Q. Yes.

14 A. That's going back?

15 MR. PURVIS: 6631.

16 THE WITNESS: Oh, 66? I'm sorry.

17 BY MR. MANNING:

18 Q. That's all right.

19 A. Sorry.

20 6631. I have it.

21 Q. See number five, it says "Sex"; right?

22 A. Number five. "Sex"; that's what it says.

23 Q. "Last -- But Surely Not Least"; right?

24 A. I hope it's not least.

25 Q. I'm just going to talk about the document. I'm

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1 not going to characterize it.

2 A. Sorry about that. It's getting late.

3 Q. That's fine. Yeah.

4 And it says, "FUBYAS versus Switchers"; right?

5 A. That's what it says.

6 Q. Under "FUBYAS" it says, "Lots of Dates"; right?

7 A. That's what it says.

8 Q. "Links to Success Need"?

9 A. That's what it says.

10 Q. "Anything Goes"?

11 A. That's what it says.

12 Q. "Links to Excitement Need"?

13 A. That's what it says.

14 Q. Different analysis under switchers; right?

15 A. Yes.

16 Q. So at least it would appear to be at least some

17 marketing efforts that are taking sex into account

18 with respect to FUBYAS?

19 A. That's what this documents indicates.

20 Q. Yes.

21 And if that's going on at this company in 1985,

22 at RJR, you don't know whether that's in

23 contravention of the Cigarette Advertising Code?

24 A. I have no way of knowing whether it was or was

25 not.

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1 Q. You don't know if that's in violation of the
2 code, or what they have said they will not do
3 publicly, do you?

4 A. I have no way of knowing one way or the other.

5 MR. MANNING: Why don't we take our break before
6 we go to the next document?

7 (Adjourned at 5:21 p.m.)

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2

3 C E R T I F I C A T E

4

5 STATE OF MINNESOTA }
6 }
7 COUNTY OF GOODHUE }

8

9 I hereby certify that I reported the
10 deposition of DR. HYMAN BERMAN, on the 15th day of
September, 1997, in Minneapolis, Minnesota, and that
the witness was, by me, first duly sworn to tell the
truth;

11

12 That the testimony was transcribed by me
and is a true record of the testimony of the witness;13 That I am not a relative, or employee, or
14 attorney, or counsel, of any of the parties; or a
relative or employee of such attorney or counsel;15 That I am not financially interested in the
action and have no contract with the parties,
attorneys, or persons with an interest in the action
that affects or has a substantial tendency to affect
my impartiality;16 That the right to read and sign the
deposition by the witness was reserved.

17

18 WITNESS MY HAND AND SEAL this 22nd day of
September, 1997.

19

20

21 _____
 Janet D. Winberg, RPR
 Notary Public, Goodhue County MN
 My Commission expires 1/31/2000.

22

23 {Seal}

24

25

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